TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 285.

JOHN H. BASS, APPELLANT,

vs.

GEORGE MILMINE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED JANUARY 20, 1887.

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1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden in the United States court-rooms, in the city of Fort Wayne, in said district, on the second Tuesday in December, in the year of our Lord one thousand eight hundred eighty-six, before the Honorable William A. Woods, judge of the district court of the United States for the district of Indiana and *ex officio* judge of said circuit court.

GEORGE MILMINE
vs.
JOHN H. BASS, JACOB C. BOWSER, MOSES OPPENHEIMER, CHARLES A. MUNSON, HARMON E. STEARNS, CHARLES F. STEARNES. } No. 38. Chancery.

Be it remembered that heretofore, to wit, in vacation of said court, on the 23rd day of September, A. D. 1882, the following proceedings in the above-entitled cause were had, to wit:

2 Comes now the complainant, George Milmine, by L. M. Ninde, Esq., his solicitor, and files herein his bill of complaint against the defendants, John H. Bass, Harmon E. Stearns, Charles F. Stearns, Moses Oppenheimer, Jacob C. Bowser, and Charles A. Munson, in these words:

See amended bill.

And thereupon a subpœna is issued requiring said defendants to appear and answer said bill at next rule day, to wit, the first Monday — November next.

And afterwards, to wit, in vacation of said court, on the 6th day of November, A. D. 1882, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, by Mess. Coombs, Bell & Morris, their solicitors, and file their motion herein to dismiss this cause in these words:

And afterwards, to wit, in vacation of said court, on the 1st day of December, A. D. 1882, the following further proceedings in
3 the above-entitled cause were had, to wit:

And now comes the complainant, George Milmine, by L. M. Ninde, Esq., his solicitor, and files herein his amended complaint in these words:

See reamended bill.

And afterwards, to wit, at the December term of said court, on the 13th day of December, A. D. 1882, before the Honorable Walter Q. Gresham, judge of the district court of the United States for the district of Indiana and *ex officio* judge of said circuit court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, and, on motion, the defendants are granted time to answer said complaint and interrogatories until the first

Monday in February next, in default of which on said day said bill of complaint may be taken *pro confesso*.

And afterwards, to wit, in vacation of said court, on the 5th day of February, A. D. 1883, the following further proceeding- in the above-entitled cause were had, to wit:

4 Comes now Moses Oppenheimer, by Mess. Coombs, Bell & Morris, his solicitors, and files his separate answer to said bill of complaint in these words:

See answer to reamended bill.

And also now comes Jacob C. Bowser, by Mess. Coombs, Bell and Morris, his solicitors, and files his separate answer to said bill in these words:

See answer to reamended bill.

And now also comes John H. Bass, by Mess. Coombs, Bell and Morris, his solicitors, and files his separate answer to said bill in these words:

See answer to reamended bill.

And now also comes Charles A. Munson, by Mess. Coombs, Bell and Morris, his solicitors, and files his separate demurrer to said bill in these words:

And afterwards, to wit, at the June term of said court, on the 13th day of June, A. D. 1883, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the

5 above-entitled cause were had, to wit:

Come now the parties, by their solicitors, and the complainant is ruled to reply to said separate answer of Bass.

And afterwards, to wit, at the June term of said court, on the 13th day of June, A. D. 1883, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the complainant and files his reply to the separate answer of defendant, John H. Bass.

See reply to answer to amended bill.

And afterwards, to wit, at the December term of said court, on the 13th day of December, A. D. 1883, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, John H. Bass, by Coombs, Bell and Morris, his solicitors, and by leave of court now files his

6 amended separate answer to said bill of complaint in these words:

See answer to reamended bill.

And now the complainant, on motion and leave of court, is granted thirty days' time within which to file his amended bill herein.

And it is ruled that the defendants be required to file answers thereto within thirty days thereafter.

And afterwards, to wit, in vacation of said court, on the 3rd day

of September, A. D. 1884, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the complainant, by Ninde and Ellison, his solicitors, and files herein his reamended bill of complaint in these words:

Humbly complaining, showeth unto your honors your orator, George Milmine, who is a citizen and resident of the city of Toledo, in the State of Ohio, that on the first day of June, 1875, Jacob C. Bowser and Delila Bowser, his wife, executed a mortgage upon the following-described property, to wit: The south half ($\frac{1}{2}$) of the
7 southwest quarter ($\frac{1}{4}$) of section eight (8), township thirty (30) north, of range thirteen (13) east; also the east half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) of section seventeen (17), township thirty (30) north, of range thirteen (13) east, except ten (10) acres in the northeast corner and right of way granted to the Ohio and Indiana Railroad Company, and also all that part of the west half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) of section seventeen (17), township thirty (30) north, of range thirteen (13) east, which lies north of the grounds of the Ohio and Indiana Railroad Company, containing twenty-three and $\frac{5}{100}$ acres, all lying and being in Allen county and State of Indiana, to secure the payment, when it became due, of a certain promissory note for four thousand eight hundred and eighty-five $\frac{19}{100}$ dollars, bearing even date with said mortgage, and payable three (3) years after date, with ten per cent. interest, given by Jacob C. Bowser aforesaid to one David Smith, who was then a resident and citi-
zen of said State of Ohio, where he continued to reside and
8 remained such citizen until he died, as hereinafter set fourth; copies of which said mortgage and note are attached hereto and marked Exhibits "A" and "B."

That said mortgage was duly recorded in the mortgage record in the office of the recorder of Allen county on the first day of June, 1875.

And your orator, further complaining, says that afterwards, to wit, on the — day of ——, 187–, the said David Smith departed this life, in the said city of Toledo and State of Ohio, testate, and by his last will he appointed William H. H. Smith executor and Sarah B. Smith executrix of his said will, who were also at the time and are yet citizens of said State of Ohio; that said executor and executrix duly qualified as such and letters testamentary were duly issued to them in that behalf by the authorized court in said State of Ohio;
that afterwards, to wit, on the first day of August, 1877, the
9 said executor and executrix duly assigned said note by indorsement thereof, and also assigned said mortgage to your orator; copies of which assignments are hereto attached and filed herewith, marked Exhibits "C" and "D;" that the assignment of said mortgage was duly acknowledged by said assignors and duly recorded on the margin of the record of said mortgage on the 4th day of August, 1877.

And your orator, further complaining, says that, being the owner of said note and mortgage, he instituted suit thereon to foreclose the same in the superior court of Allen county, Indiana, on the 5th day of June, 1878, by filing his complaint in said court; that the fol-

lowing-named parties, who held liens or were otherwise interested in said mortgaged premises, were made parties defendants to said suit and were duly served with process therein, to wit, said Jacob C. Bowser, Delila Bowser, John H. Bass, William Meredith, Daniel Noys, William D. Wines, The Huron Iron Company, Thomas
10 Swank, Christian Swank, the Fort Wayne National Bank, Joseph M. Sharp, Jeremiah Kirby, The Eastern Kentucky Railway Company, John Warren, Jacob Weis, Frederic Hoffer, Henry Chandler, Hiram Campbell, John M. Campbell, Joseph H. Campbell, Marcus Hauna, Robert A. Rhoades, James T. Rhoades, Henry Duston, Hamilton Duston, Albert H. Duston, William C. Allison, Thomas E. Allison, John R. Kitt, administrator of the estate of Frederic Rittinger, deceased; Frederic J. Hayden, Frederic Kenning, Hester A. Wood, Charles Huston, Charles Penraser, First National Bank of Philadelphia, Minerva McMahon, Horace G. Cleveland, Peter M. Hitchcock, Aaron M. Wilcox, Martin Barnwell, Joseph H. Brown, John O. Brown, John McMerriman, Mary O. Cannell, executrix of David O. Cannell, deceased; Martin H. Miller, Frederic Hartmeyer, Cleveland City, Hamilton Bank, Forge and Iron Company, Henry A. Rogers, Martin H. Miller, adminis-
11 trator of George Miller, deceased; James Olelin, Henry B. Fillinghast, James Monroe, Olliver B. Fillinghast, Edwin K. Wood, Giles Gilbert, Bassit Hendricks, Lucian J. Knowles, and Noah Clem.

That your orator aver-ed and set forth in his said complaint the execution of the said note and mortgage, the assignment thereof, and that the same was due and unpaid, and that the scrivener who drew the said mortgage made a slight mistake in describing said note, the same being described in said mortgage as a note for $4,884.19, when in fact it was a note for $4,844.19, and asked that such a mistake be duly corrected; and he also averred that all the claims of each and every and all said defendants named in, upon, or to said land so mortgaged to the plaintiffs were junior and subsequent to your orator's said mortgage.

And your orator, further complaining, says that, to wit, on the 13th day of January, 1879, your orator filed a supplemental
12 complaint in said cause in said court, setting forth and averring that it had been ascertained that the claim of said defendant, Noah Clem, was for a tax deed thereon issued to him before said suit was brought; that the taxes, penalties, and costs for which said tax sale was made amounted to the sum of $212.70, and that said Clem would accept that sum in full satisfaction and discharge of such tax title, and that to protect his said mortgage lien he had been compelled to pay the said Clem for such tax lien the sum aforesaid, and he set forth a prayer in said supplemental complaint that the said sum so paid to protect his mortgage lien be declared to be a lien also upon said premises, and prior to all claims and liens of said defendants.

And your orator further says that such proceedings were had in said court in said cause that on the 24th day of January, 1879, your orator recovered by the judgment of said court a decree in

said cause for his mortgage debt, interest, and costs, and for
13 the said sum of $212.70 so paid by him in liquidation of said tax title, amounting to the sum of six thousand eight hundred and thirty dollars and a payment for fifty-four $\frac{15}{100}$ dollars costs, and that the same was a first and prior lien upon said mortgaged premises to any and all the claims, liens, titles, and rights of any and all of said defendants, and that said mortgaged premises should be sold by the sheriff of said county upon a certified copy of said decree, duly issued by the clerk of said court to said sheriff, as other lands are sold upon execution at law, to pay the plaintiff's said judgment, interests, and costs, and that all rights, title, and interest of each and every one of said defendants be, and are thereby, cut off, barred, and foreclosed.

And your orator, further complaining, says that on the 28th day of January, 1879, your orator caused a duly certified copy of said decree to be issued by the clerk of said court to the sheriff of said county, who, after duly advertising the time and place of sale thereof, did, on the first day of March, 1879, sell said premises at
14 public vendue to your orator, he being the highest and best bidder at such sale, and duly executed a certificate of such sale to him; that no redemption of said premises from such sale was made within the year such redemption could have been made, and at the end of such year the said sheriff duly conveyed, by his deed duly executed, said premises to the plaintiff, a copy of which is filed herewith, marked Exhibit "J;" that he bid at said sale the sum of $7,048.70, $6,900.18, of which he paid by a receipt to said sheriff of said judgment and interest thereon, and for the balance of said bid, to wit, the sum of $148.52, he paid said sheriff cash.

And your orator, further complaining, says that on the 12th day of May, 1873, Harmon E. Stearns, Charles F. Stearns, and Moses Oppenheimer, by the judgment of the Allen circuit court in a certain cause therein then and there pending, wherein they were plaintiffs and Reuben Gardener, Andrew C. Gardener, Henry Blish
15 as principals and Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls as surities were defendants, recovered a judgment for the sum of $2,212.85 and the costs of said suit, taxed at $4.70, in which judgment so recovered it was further declared and adjudged, as the truth in fact actually was, that said Reuben Gardener, Andrew C. Gardener, and Henry Blish were principal debtors and the said Bowser, Prentis, and Falls only surities.

And your orator, further complaining, says that the said principal debtors in said judgment paid thereon to said judgment plaintiffs, on the 31st of December, 1873, the sum of $354.93, and on the first of January, 1874, the sum of $145.07, and on the first of May, 1874, the said principal debtors paid said judgment plaintiffs the accrued interest upon said judgment up to said first of May, 1874.

And your orator, further complaining, says that on the 20th day of June, 1876, said principal debtors paid all accrued interest
16 up to said last-named date on said judgment, and also paid to said judgment plaintiffs the sum of $322.50, or some other sum, being the interest that would accrue upon the amount of said

judgment then due, up to and until the first day of January, 1878, from said 20th day of July, 1876, when the same was paid; and your orator expressly charges that said interest was so paid on the said 20th day of July, 1876, in advance, up to said first of January, 1877, upon the contract and agreement, then and there entered into by and between said principal debtors and said judgment creditors, that no execution should be issued upon said judgment from said 20th of July, 1876, to said Jan. first, 1877; which agreement was fully carried out by said judgment plaintiffs, and no execution was issued by them on said judgment until the 12th day of June, 1877; and your orator expressly charges that such agreement, so entered into by and between said judgment plaintiffs and the said principal debtors in said judgment, by its terms and by the intent and
17 meaning of all said parties, it was stipulated and agreed by and between them that if said principal debtors would pay such interest in advance, from said 20th of July, 1876, to the first day of January, 1877, the said judgment plaintiffs would extend the time and give said principal debtors further delay of payment of said judgment until said first day of January, 1877; all of which payments said Bass knew when he purchased the said land on which plaintiff's said mortgage was a lien; and he further expressly charges that the legal effect of the acceptance of such interest in advance, from said 20th of July, 1876, to said first of January, 1877, was by operation of law to give day of payment of said judgment until the operation of said period for which such interest was so taken in advance, and that, by the entering into such agreement by and between said parties on said 20th of July, 1876, and by the acceptance of said interest in advance by said judgment plaintiffs, the said Jacob C. Bowser, Joseph R. Prentis, and
18 Daniel M. Falls, as such sureties, were absolutely discharged from all liability as such sureties and judgment defendants, and that said judgment, as to them and each of them, became and was wholly satisfied; and your orator says that at the time said extention was granted said Prentis and Falls were solvent and said judgment could have been collected from either of them, and yet your orator further charges and says that, notwithstanding said judgment was so discharged and satisfied as to said Bowser, Prentis and Falls and they so absolutely released therefrom, the said judgment plaintiffs caused an execution on the 12th day of June, 1877, to issue on said judgment to the sheriff of Allen county, whereby said sheriff was commanded to make out of any and all such judgment defendant the sum of $2,212.85, the amount of said judgment, and $4.70, costs, and interest from said January first, 1877, when there was only $1,552.05 due thereon, of which said Bass had
19 notice when he purchased the property in controversy, a copy of which writ of execution, marked Exhibit "E," is filed herewith and made part of this bill of complaint.

And your orator, further complaining, says that the sheriff of Allen county, by virtue of the said writ and the authority therein contained, duly levied the same upon lots No. 116 and 117 in the original plat to the city of Fort Wayne, in the said Allen county,

and, having advertised the same for sale and in pursuance thereof, duly offered said lots and each of them for sale on the 21st day of July, 1877, but which were not sold by him for want of bidders; and on the 21st of September, 1877, the said sheriff, having duly advertised the same, again offered the said lots for sale, but the same were not sold for want of bidders, and the said writ was returned on the 26th Nov., 1877, with said proceeding endorsed thereon.

And your orator, further complaining, says that on the 9th October, 1877, said judgment plaintiffs caused an execution to
20 issue upon said judgment, directed to the sheriff of Miami county, where said principal debtors then resided, which was returned on the 25th of October, 1877, by said sheriff duly served upon said principal judgment defendants, but that no property could be found whereon to levy said writ, a copy of which writ and return are herewith filed and marked Exhibit "F."

And your orator, further complaining, says that on the 26th day of November, 1877, said Stearns *et al.*, judgment plaintiffs, caused a *vendi. exponas* to issue upon said judgment, and therein was recited the former levy upon said lots 116 and 117, and ordered the sheriff of Allen county to sell said property, which said *vendi.* was duly returned on the 22nd of December, 1877; that said sheriff had duly advertised the sale of said lots, and that he had duly offered them for sale, but that they did not sell for the want of bidders, a copy of which *vendi.* is filed herewith and made part hereof and marked Exhibit "G."

21 And your orator, further complaining, shows to your honors that the said Stearns *et al.*, on July 5th, 1878, caused a second writ of *venditio exponas* to be issued upon their said judgment to the sheriff of the said Allen county, thereby commanding him to advertise and sell said lots 116 and 117, so levied upon as aforesaid.

And your orator, further complaining, says that, with full knowledge of your orator's mortgage upon the premises therein described, and that your orator had filed his complaint in said superior court of Allen county to foreclose the same, and that his cause was then pending in the said court for the said purpose, which knowledge was brought home to him by process duly served upon him and his appearance entered in said cause on July 1st, 1878, which he withdrew on July 8th, 1878, John H. Bass entered into a combination with said Harmon E. Stearns, Charles F. Stearns, and Moses Oppenheimer, and their attorneys that said judgment plaintiffs and their said attorneys should abandon the levy upon said lots 116 and 117,
22 although the same were amply sufficient in value to pay said judgment and to procure the return of said *vendi.* and the issue of a *fieri facias* upon said judgment; and your orator further avers that said judgment plaintiffs and their said attorneys and said Bass conspired together and, with Charles A. Munson, who was then sheriff, held the said *vendi.*, and all agreed among themselves that said *vendi.* should be returned with an endorsement thereon, that said levy should be abandoned, and that the said Munson, as such sheriff, should endorse on said *vendi.* as follows: "This execution is returned unsatisfied. The within levy released. Clerk will please

issue *alias* execution. July 6, '78. C. A. Munson, sheriff, by Platt J. Wise, dep.," a copy of which *vendi.* and return are filed herewith, and by incorporation made part hereof and marked Exhibit " H."

And your orator, further complaining, shows to your honors that to carry out and perfect such combination and conspiracy, the
23 said Bass and his said attorneys, and the said Stearns, and Stearns and Oppenheimer and their attorneys, and said Munson and said Jacob C. Bowser agreed among themselves that upon such *vendi.* being returned an *alias* execution should be issued and levied upon the said premises so held by your said orator by his said mortgage, and that the same should be advertised and sold to the said Bass for about the amount of said judgment, interests, and costs, and in that way cut out the plaintiff's said mortgage and wholly destroy his interest in said mortgaged premises, and wholly prevent him from ever recovering anything upon his said debt.

And your orator further avers that said Harmon E. Stearns, Charles F. Stearns, and Moses Oppenheimer, well knowing that there was but $1,552.05 due on their said judgment, did, at the time they had an execution issued thereon, on the 5th day of July, 1878, cause the same to be issued for $2,212.85, and in combination
24 with said Bass, who knew the real amount due thereon, cause the same to be levied upon the land upon which plaintiff's said mortgage was a lien as aforesaid, and then and there claimed the same was a lien on said land to that amount, and demanded the sale thereof to satisfy the same, and that, after having advertised the same as aforesaid, the said Munson did offer the same for sale thereon on the 3rd day of August, 1878, and said Bass, well knowing the true amount due on said judgment, did at said sale bid therefor the sum of $2,000.00, and said Munson, as such sheriff, then and there sold the same to said Bass for said sum of $2,000.

And your orator expressly charges that said Bass, Bowser, and Munson, and their advisers, at the time they entered upon said scheme to injure your orator and destroy his lien upon said mortgaged premises and prevent his collection of his said debt—that they and each of them well knew that your orator was a non-resi-
25 dent of the State of Indiana, and that he resided at Toledo, in the State of Ohio; and they also knew that the Fort Wayne Weekly Sentinel, in which they caused the advertisement of the sale of his said mortgaged premises to be made, was a weekly paper of small and local circulation, and that there would be no likelihood or probability that your orator would ever see a paper containing such advertisement or hear of the same; and he expressly charges that they and each of them caused such course to be taken and said *vendi.* returned and said *alias* writ issued, and had said sale made thereon expecting and believing your orator would never discover the facts until said Bass could so purchase in said premises and receive the sheriff's certificate of purchase and hold the same until the year allowed by law to return said sale would have elapsed, and that said hope and expectation was fully talked over and considered by said Bass and said Munson and said Bowser and their

advisers in the premises. And your orator avers that
26 so it was, and became in fact true, that he did not know or learn or suspect in any manner whatever that the said Stearns *et al.*, judgment plaintiffs as aforesaid, had released or consented to release said lots 116 and 117 or ordered the return of said *vendi.* or caused such *alias* execution to issue and be levied upon said premises upon which he held said mortgage or caused the same to be sold, or that the said Bass had bought the same or procured a sheriff's deed therefor until long after all of said acts, facts, and things had taken place and been completed, and he avers that he had no occasion to know said facts; that he had the right to rely upon that; that said judgment debt of said Stearns *et al.* was duly levied upon said two lots, and that said lots were worth largely over and above said judgment debt and interest and costs, and that the same debt was in law satisfied until said levy was legally disposed of by the sale of said property so levied on; and he avers that such levy was as to
27 him a satisfaction of said judgment, so far as the lien thereof affected his said mortgaged premises, until the property so levied on was duly sold under said writ or the same released by his consent.

And your orator further avers that when the said Stearns *et al.* recovered their said judgment against said Jacob C. Bowser he was the owner in fee simple of the following-described real estate, situated in said Allen county, and became subject to the lien of said judgment besides the premises upon which your orator's said mortgage was a lien, to wit:

Lot 17, in Bowserville, worth at least	$335 00
" 18, " " " "	335 00
" 31, " " " "	395 00
" 34, " " " "	335 00
" 39, " " " "	335 00
" 40, " " " "	335 00
" 41, " " " "	395 00
" 42, " " " "	335 00
" 43, " " " "	335 00
" 44, " " " "	375 00
" 45, " " " "	375 00
Lot 46, in Bowserville, worth at least	355 00
28 " 47, " " " "	335 00
" 48, " " " "	335 00
Lot 49, in Bowserville, worth at least	335 00
Lot 1, sub N. ½ Hanna's O. L. 6, sec. 2, 30, 12, 8 acres	305 00
E. ½ of E. ½ N. E. qr., sec. 33, T. —, R. —, 37 acres	1,665 00
S. E. ¼, sec. 37, T. 31, R. 13, 16 acres	5,420 00
S. W. ¼, sec. 27, T. 31, R. 13, 160 acres	5,580 00
Tract, N. W. ¼, sec. 34, T. 31, R. 13, 113.90 acres	3,980 00
N. W. ¼, sec. 15, T. 31, R. 13, 160 acres	1,990 00
S. E. ¼ S. E. ¼, sec. 34, T. 31, R. 13, 39.50 acres	780 00
S. E. ¼ S. E. ¼, " 34, " " 40 "	260 00
S. ½ S. W. ¼, " 30, " " 80 "	615 00

N. W. cor. N. E. ¼ N. W. ¼, sec. 9, T. 31, R. 13, 7 acres		$65 00
N. W. ¼ S. E. ¼, " 36, " " " " 40 "		615 00
N. end N. ½ S. W. ¼, " 6, " " " " 60 "		425 00
S. ½ N. E. ¼, " 18, " 3, " 15, 80 "		180 00
Total		$27,125 00

all which, together with the said lots 116 and 117, also owned by the said Bowser at the time said judgment was rendered in favor of said Stearns *et al.*, and which were then and ever since have been worth at least $6,000 in cash, making in all real estate worth at least the sum of $33,125.00, was subject to the lien of the said Stearns' judgment other than the property covered by said
29 mortgage of your orator, and all of which real estate was then free and clear from all liens and encumbrances, except the lien of said judgment, and also the lien of the following judgments, to wit:

FIRST NATIONAL BANK OF CAMBRIDGE CITY
vs.
JACOB C. BOWSER, JEFFERSON C. BOWSER, LA FAYETTE M. BOWSER.

In common pleas court, Allen county, 20th Feb., 1872, for	$1,370 85	
In circuit court of said county, Feb. 13th, 1873, for	1,452 39	
		$2,823 24

EDWARD NEY
vs.
JACOB C. BOWSER, JEFFERSON C. BOWSER, LA FAYETTE M. BOWSER.

In Allen county c't c't, 17th June, 1872, for	$700 00	
Credits	153 00	
Balance		547 00

JOSEPH MILLS *et al.*
vs.
JACOB C. BOWSER.

In — court, Feb. 13th, 1871, for	1,105 00

30 EMANUEL KEGG
vs.
JACOB C. BOWSER, JEFFERSON C. BOWSER, LA FAYATTE M. BOWSER.

In common pleas court of said county, Feb. 25th, 1873, for	66 25

HERMAN POLHEMUS
vs.
JACOB C. BOWSER, LA FAYETTE M. BOWSER.

In —— c't c't, Jan. 4th, 1872, for 1,236 00

Making in all $5,777 49

leaving a net surplus of said real estate over and above what was necessary to pay off and discharge all prior liens the amount in value of $28,347.51, out of which said judgment of Stearns *et al.* could and ought, in law and equity, to have been made and upon which it was the first lien.

And your orator, further complaining, says that the said judgment in favor of said Polhemus, Kegg, Mills *et al.*, and Ney have, since the rendition of said Stearns' judgment, been fully paid and satisfied by the proceeds of the sale of the following real estate,
31 parcel*l* of the real estate above described, to wit: Lots 17, 31, 44, 45, 46, 48, in Bowserville, and also the E. ½ S. W. qr., sec. 27, T. 30, R. 13, the same being within $845.00 upon a forced sale of the value put upon it in the above schedule.

And your orator further avers that although said Jacob C. Bowser, on the day the said judgment was rendered against him in favor of said Stearns *et al.*, was the owner in fee of all the real estate described as above, and of the full fair cash value of over $33,000 as aforesaid, and also of the premises covered by your orator's said mortgage, worth at said time at least $10,000 in cash, and now of the fair value of at least $15,000, and also the undivided one-half of lots 565, 566, 567, and 568, in Hanna's Addition to said city of Fort Wayne, Allen county, and State of Indiana, on which was a large and valuable machine shop, which on the said last-named lots was of the fair cash value of sixty thousand dollars, the undivided interest of the said Bowser therein being of the fair cash value of $30,000, making in all real estate of the fair cash
32 value of at least $85,000 so held at said date, your orator avers and charges the fact to be that upon an understanding and agreement between said Bowser and said Bass said real estate was sold either by voluntary contract or under process issued upon said judgment or upon other judgments rendered against said Bowser and parts of said titles taken and held by said Bass and part thereof taken and held by other parties, but the proceeds of such sales to other parties passed over to and held by said Bass as collateral security for certain endorsements and liabilities theretofore incurred by said Bass for said Bowser and said Bowser and others, and after which said liabilities were liquidated said Bowser was to receive the full benefit of all said property and the proceeds of the sale thereof, deducting the amounts paid in the formal purchase of all said real estate, and in the furtherance of such arrangement said Bowser consented to all of the sales of said premises that were made under judicial process, turning out and permitting levies to
33 be made thereon under junior judgments, and the sale thereon to be made for nominal sums, amounting to a mere fraction of

their cash value, which sales upon said junior judgments were made subject to said prior judgments and under such circumstances that no proper competition could arise among bidders at such sale.

And your orator further shows unto your honors that all of said premises so owned by said Bowser at the time said mortgage to your orator was so executed, and which property other than that described in your orator's said mortgage ought to have been and was the primary fund out of which said Stearns' judgment and all other judgments so rendered before the date of your orator's said mortgage ought to have been levied and made out of said premises other than said mortgaged premises, yet, acting contrary to equity and good conscience, the said Bowser and the said Bass procured the levy of judgments rendered against said Bowser long after your
34 orator's said mortgage was executed and duly recorded upon all of said Bowser's said property other than that described in said mortgage, and permitted and procured the same to be sold and passed to said Bass for the amount of said bid so made by him, which was then and there not more than one-sixth its cash value, thus taking from said plaintiff said premises, out of which alone he could or yet can make his said debt; that said Bowser has no other property out of which he can collect his said debt unless the said interest of said Bowser in all said premises so owned and held by him, and the title to which has passed to and is now held by said Bass, is declared by the decree of this court and directed to be applied to your orator's said debt in the payment thereof.

And your orator, further complaining, showeth unto your honors that before said arrangement and agreement was made by and between said Bowser and said Bass to transfer by sales under
35 judicial process and otherwise all said premises to said Bass, to be held by him as aforesaid, the said Bowser executed to said Bass a mortgage on all said property and upon all other real estate of said Bowser at the time nominally for the sum of $20,000 or some other large sum of money, but in truth and in fact only as a collateral security for said endorsements so made by said Bass for said Bowser as aforesaid, and said Bowser and said Bass so managed that they procured all the property so owned by said Bowser, except that covered by your orator's said mortgage, to be sold upon judicial process while the titles were so apparently covered and beclouded, purchased by said Bass as aforesaid upon the understanding and agreement as aforesaid and for the purpose of protecting said titles so procured and held by the said Bass for the benefit of said Bowser after said Bass should be fully paid, and to prevent said Stearns' judgment from being enforced against the same and to enable said Bowser and Bass also to secure the title of said premises so mortgaged to the plaintiff and to cut off and destroy his title so secured under his said foreclosure the said Bowser consented to set
36 aside said levy upon said lots 116 and 117 and have the said *vendi.* issued upon the said Stearns' judgment returned and and [an] *alias fi. fa.* issued upon said judgment and levied upon the plaintiff's said property and the same sold.

All of which actings and doings of said Jacob C. Bowser, John H.

Bass, Charles Munson, Harmon E. Stearns, Charles F. Stearns, and Moses Oppenheimer are contrary to right and good conscience and tend to the manifest wrong and injury of your orator; wherefore, inasmuch as your orator is remediless at common law and cannot have adequate relief except in a court of equity, where matters of this sort are properly cognizable and relievable, to the end that the said Jacob C. Bowser, John H. Bass, Charles *and* Munson may, upon their several corporal oaths, according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, perfect, and distinct answers make to all and singular the matters aforesaid, and that as fully and particu-
37 larly as if the same were here repeated and they thereunto severally and respectively distinctly interrogated, and more especially that the said defendants, Jacob C. Bowser, John H. Bass, Charles Munson, Harmon E. Stearns, Charles F. Stearns, and Moses Oppenheimer, may in manner aforesaid answer and set forth whether—

1. The purpose of setting aside the levy of said execution so issued on the said judgment so rendered in favor of said Stearns *et al.* against said Bowser was not to enable said Bass to procure the *alias* execution issued thereafter upon said judgment upon said premises so mortgaged to your orator at the time.

2. Did not said John H. Bass say to said Munson as to said Stearns *et al.* or to their attorney or attorneys, or procure or cause some one or more in his behalf to say to said Stearns *et al.* or their attorney or attorneys, that if they would release said levy on said lots 116 and 117 and levy the same on said mortgaged premises he, said Bass, would levy the same at said execution sale for
38 enough to pay off said judgment, and was not the levy recited in said *vendi.* set aside for the very purpose and no other of levying upon said mortgaged premises and selling the same to said Bass? If no agreement of that kind was made state fully what agreement or understanding did exist upon which said *vendi.* was set aside and a new *fi. fa.* issued. State especially why said Munson directed said levy to be set aside and why he ordered an execution to issue and upon whose direction and authority the statements were made by said Munson, as such sheriff, and endorsed upon said *vendi.*

3. State fully and according to your and each of your best knowledge and belief whether said lots 116 and 117 are not now and were not then worth more than enough to pay said judgment. State what, in your best judgment, they were worth when the sheriff made his said *vendi.* bearing date July 6th, 1878.

4. Was it not the purpose of you or one or more of you to
39 cause said judgment to be made out of said mortgaged premises to prevent the levy thereof upon other property, the title to which was then vested in said Bass or said Bowser or his assignee?

5. Was it not the purpose by making such changes in the levy of said judgment from said lots 116 and 117 to mortgaged premises to get in the title to said mortgaged premises upon a sale thereof

upon such new levy, and did you not intend thereby to cut off the lien of said mortgagee?

6. Did you not then know that the said mortgage lien was the only chance or hope there was for the collection of said mortgage debt?

7. Did you not know at the time you caused the said *vendi.* and the levy recited in it to be returned and set aside that the said Bowser had no other property out of which said mortgage debt could be made?

8. Did you not then know that said mortgaged property was worth the whole of said mortgage debt and three or four times the amount of said judgment and what said Bass purchased it at at sheriff's sale? Answer how much said mortgaged premises were then worth.

9. Did not said Bass at the time said *vendi.* was returned by said Munson agree to bid on or buy said mortgaged premises on the said *alias* execution when the same was issued?

10. Did not said Stearns *et al.* accept interest upon the said judgment from the principal judgment debtors in advance and on the agreement to extend time of payment thereof? Set forth all the payments made on said judgment and their dates and amounts and the agreement entered into between the judgment plaintiffs and any of the judgment defendants. State every thing done and said in reference thereto.

11. State whether said Bass did not hold a mortgage upon all of said Bowser's property at the time said *vendi.* was returned or at some other time; if so, state when said mortgage was executed and what for, and set forth a copy thereof as an exhibit to the *the* answer hereto; also set forth a copy of any bond, note, or agreement of any kind secured by said mortgage. Give a description in full of all the obligations, agreements, notes, bonds, or other agreements or evidence of indebtedness which said mortgage was given to secure.

12. If said mortgage secured any indemnity bond of said Bowser and others conditioned to save said Bass harmless from any and all endorsements or suretyship undertaken or agreed for by said Bass for him or them, state fully the character and terms of said bond, and set forth a copy thereof with your answer hereto; also set forth, in answer to this interrogatory, what debts said Bass has been compelled to pay that were covered by his bond or mortgage or otherwise, and to whom and the amount of each.

13. State how said moneys said Bass has been compelled to pay have been paid back to said Bass; or, if not paid in whole or in part, state what amount is yet due said Bass and how the same is secured.

14. What property has said Bass purchases and recovered the conveyance for from said Bowser, or from said sheriff, or from any other person who got the title from said Bowser or said sheriff since said plaintiff's said mortgage was executed? State the date of each conveyance, the price paid for each piece, and upon understanding as to said Bowser retaining any interest therein ex-

ist*ed* at the time, whether previously made or made at the time any of said conveyances were made.

15. Who now holds the title to lots 116 and 117 and what interest has said Bowser therein? What rent does he pay for the occupancy thereof, and to whom does he pay it, and upon what contract or arrangement?

16. What secret understanding or agreement, if any, exists between said Bass and said Bowser as to said Bowser's interest in any or all of said property so owned by him when said mortgage was taken? Does not said Bowser expect to have or receive some
43 interest or compensation or benefit hereafter from any of said property, or does not or has not some member of his family received or expected to receive some interest in or benefit from some or all of said property? State what expectations or what interest or benefit is and upon what statements do they rest.

17. Was there nothing ever said between said Bowser and said Bass to induce said Bass to consent to the release of said levy on lots 116 and 117, and has the said judgment been levied upon said mortgaged premises? If so, state the substance of all such statements or communications.

18. Did not said Bass get the notes given to Bowser, Prentis, and Falls, or some one or more of them, for the property upon which their said foundry and machine works were located on Water street, in Fort Wayne, Indiana? Were not said premises sold to McLachlan or McLachlan and Olds or some one else by said Bowser or Bowser, Prentis, and Falls; and, if so, was not said sale made after
44 said Bass held a mortgage thereon, and did not said Bass get the proceeds of said sale in notes or money or other assets? And, if so, state how much he got, and when he got it, and what kind of assets or property; or, if it was received in money, so state, and the amount, and if in property state its value, and what became of it, and, if sold, who got the proceeds of sale thereof.

19. Did not Bowser, Bass and Munson and said judgment plaintiffs expect to have said *vendi.* returned and said *alias* execution issued and levied on said mortgaged premises, and have the same sold to said Bass and the year of redemption expire and the sheriff's deed therefor executed before the plaintiff should find out or know the steps taken to accomplish said purpose were in any way in progress, or that there was any change in such levy? Was not such expectation talked of and the probability of the plaintiff finding the same out discussed between you, and was it not on the belief and expectation, on the part of said Bass, Bowser
45 and Munson and those acting for them, that the plaintiff would not find out or learn of said proceedings until it was accomplished, and thus have no opportunity or chance to file his bill to compel said judgment plaintiffs to make the said judgment out of other property and protect his mortgage lien? And did not said Bass, in the expectation that said scheme would not be discovered by the plaintiff until said Bass should get his deed, have his attorneys examine the question as to whether the plaintiff could set aside or in any manner disturb his, said Bass's, said deed, if he

once secured the same, and was it not upon such advice so secured that said attorneys of said Bass withdrew his appearance in the case of the plaintiff against said Bowser, Bass, and others in the superior court of Allen county to foreclose said mortgage, and was it not upon such advice that said levy was released and a new *fi. fa.* issued and levied on said mortgaged premises, and the same bought by said Bass as aforesaid? State all that was said and done, con-
46 sulted and expected, in reference to said transaction by said Bass, Bowser, and Munson.

20. State what is the fair cash value of said mortgaged premises at the date of the institution of this suit and what is the said value thereof at the date of making answer hereto.

21. What rents and profits have been received by said Bass since he made said purchase of said mortgaged premises therefrom and whether such is the fair rental value thereof?

May it please your honors, therefore, to grant to your orator your writ of subpœna, commanding said defendants, Harmon E. Stearns, Charles F. Stearns, Moses Oppenheimer, Jacob C. Bowser, John H. Bass, and Charles Munson, who are all citizens and residents of the State of Indiana, to appear, to the end that they may as aforesaid distinctly answer upon oath whether each particular fact and charge in this bill is not as therein stated or how otherwise, and that they and each of them answer each, every, and all the foregoing
47 interrogatories as aforesaid according to their and each of their best knowledge, information, and belief, and that said sheriff's sale of said mortgaged premises, and the *alias* execution upon which it was made, and said sheriff's deed, and all other of said proceedings may be declared void and be by the decree of this court wholly set aside, and that said Bass be decreed to hold his said title to said mortgaged premises in trust for your orator, and be decreed to come to an account to him for the rents and profits thereof during the period from the date of said sale to the rendition of the decree in this cause, and that said Bass may be decreed to hold all said titles of said divers pieces of property described as aforesaid, and that said Bowser's interest therein be sold under the decree of this court to pay your orator's said debt, and that your honors may grant your orator such other and further relief in the premises as equity and good conscience may require; and your orator will ever pray.

By NUIDE & ELLISON,
His Solicitors.

48 EXHIBIT "A" TO BILL.

This indenture witnesseth: That Jacob C. Bowser and Delila Bowser, his wife, of Allen county, in the State of Indiana, mortgage and warrant to David Smith, of Lucas county, in the State of Ohio, the following real estate in Allen county, in the State of Indiana, to wit: The south half ($\frac{1}{2}$) of the south half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) of section eight (8), town. thirty (30) north, range thirteen (13) east; also the east half ($\frac{1}{2}$) of the northwest quarter of section seventeen

(17), town. thirty (30) north, range thirteen (13) east (except ten (10) acres in the northeast corner and right of way granted to the Ohio and Indiana Railroad Company); and also that part of the west half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) of section seventeen (17), town. thirty (30) north, range thirteen (13) east which lies north of the grounds of the Ohio and Indiana Railroad Company, containing $23\frac{5}{100}$ acres, to secure the payment, when it shall become due, of a certain promissory note for four thousand eight hundred
49 and eighty-four $\frac{19}{100}$ dollars, bearing even date herewith, and payable three (3) years after date, with ten per cent. interest, given by Jacob C. Bowser in favor of David Smith; and the mortgagors expressly agree to pay the sum of money above secured without relief from valuation or appraisement laws.

In witness whereof the mortgagors have hereunto set their hands and seals this first day of June, 1875.

J. C. BOWSER. [SEAL.]
DELILA BOWSER. [SEAL.]

EXHIBIT "B" TO BILL.

Three years after date I promise to pay to the order of David Smith four thousand eight hundred and fourty-four $\frac{19}{100}$ dollars, Hamilton Bank, Indiana, for value received, without any relief whatever from valuation and appraisement laws, with ten per cent. interest from date, payable annually until paid.

J. C. BOWSER.

Attest: R. C. BELL.

50 EXHIBIT "C" TO BILL.

TOLEDO, OHIO, *August 1st*, 1877.

For value received we, as the executors of the last will and testament of David Smith, deceased, hereby assign and transfer to George Milmine, of Toledo, Ohio, all the right, title, and interest of the estate of David Smith, deceased, in and to the foregoing mortgage, and do hereby warrant that the debt secured thereby remains unpaid, except interest thereon up to June 1st, 1876.

W. H. H. SMITH, [SEAL.]
Executor of the Estate of David Smith, Deceased.
SARAH B. SMITH, [SEAL.]
Executrix of the Estate of David Smith, Deceased.

1. W. S. THURSTON.
2. FLORENCE H. SMITH.

STATE OF OHIO, *Lucas County,* } *ss:*

This day personally appeared before the undersigned, a notary public within and for Lucas county, Ohio, William H. H. Smith and

Sarah B. Smith, the executor and executrix of the last will and testament of David Smith, deceased, and who executed the fore-
51 going assignment and acknowledged the same to be their free act and deed as such executor and executrix.

In testimony whereof I have hereunto set my hand and seal officially this 2nd day of August, A. D. 1877, at Toledo, Ohio.

WESLEY S. THURSTIN,
Notary Public, Lucas County, Ohio.

Received for record this 4th day of August, 1877, at 2 p. m. Recorded on the margin of page 429, Book 27.

JOSEPH MOMMER, JR.,
Rec., Allen Co.

EXHIBIT "D" TO BILL.

Pay George Milmine or order.

W. H. H. SMITH,
Executor of Estate of David Smith, Deceased.
SARAH B. SMITH,
Executrix of the Estate of David Smith, Deceased.

EXHIBIT "E" TO BILL.

STATE OF INDIANA, } ss:
Allen County, }

State of Indiana to the sheriff of Allen county, Greeting:

52 Whereas heretofore, to wit, on the 12th day of May, 1873, Herman E. Stearns, Charles F. Stearns, and Moses Oppenheimer, by the consideration and judgment of the Allen civil circuit court, then pronounced and entered, recovered against Reuben Gardner, Andrew C. Gardner, and Henry Blish, as principals, and Jacob C. Bowser, Joseph K. Prentis, and Daniel M. Falls, as surities, judgment for the sum of twenty-two hundred and twelve dollars and eighty-five cents for damages in an action of debt, and also the further sum of four dollars and 70 cents for the costs and charges about the recovery thereof in that behalf expended—

Whereof the said Reuben Gardner, Andrew C. Gardner, Henry Blish, Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls were convicted, as appears of record, therefore you are hereby commanded to levy the said sums of money of the property of the defendants within your bailiwick subject to execution, and have the money at the clerk's office, together with interest, at the rate
53 of six per cent. per annum, on the amount of said judgment due from January 1, 1877, to satisfy said judgment, interest, and costs; also one dollar and fifty cents for this writ; and return this writ within one hundred and eighty (180) days with your doings thereon.

In testimony whereof I, F. H. Wolke, clerk of said court, have hereunto set my hand and affixed the seal thereof this 12th day of June, 1877.

F. H. WOLKE, *Clerk.*

By virtue of this execution I have this 26th day of June, A. D. 1877, levied upon lots number one hundred and sixteen and one hundred and seventeen, original or old plat of the city of Fort Wayne, Allen county, Indiana.

C. A. MUNSON, *She'ff.*
By PLATT J. WISE, *Dep.*

And after having duly advertised the above-described real estate for sale according to law I did, at the time and place designated in said advertisement, to wit, on the twenty-first day of July, A. D. 1877, between the hours of one and four o'clock of said day,
54 first, by public auction, offer the rents and proffits for a period not exceeding seven years, lot No. 116 and then lot No. 117 and then lots No-. 116 and 117, and, no person bidding, I then in like manner offered the fee simple or all the right, title, and interest of the defendants in and to lot No. 116 and then lot No. 117 and the lots No-. 116 and 117, and, no person bidding, the same remains unsold for want of bidders.

C. A. MUNSON, *Sh'ff,*
By P. J. WISE, *Dep.*

Accrued to Sentinel Co.	7 80
" return	3 30
	$11 10

After having duly readvertised the above-described real estate for sale, to wit, on the twenty-first day of September, A. D. 1877, between the hours of one and four o'clock p. m. of said day, at the door of the court-house, in Allen county, by public auction, first the rents and profits of said premises for a period not exceeding seven years, as follows, to wit: First, lot No. 116 and then lot No. 117 and lots No-. 116 and 117, and no person bidding at any or either offer,
55 I then offered the fee simple or all the right, title, and interest of the defendants in and to said real estate in parcels as follows: First, lot No. 116 and then lot No. 117 and then lots No-. 116 and 117, and, no person bidding at any offer, the same remains unsold for want of bidders.

Sept. 21, 1877.

CHARLES A. MUNSON, *Sh'ff,*
By PLATT J. WISE, *Deputy.*

Sentinel P'b. Co.	7 00
Accrue- to sh'ff	3 30
	10 30

The sheriff will please return this execution and the clerk will issue *vendi.*

This execution is returned, levy endorsed. Clerk will please issue *vendi.* Nov. 26, 1877.

C. A. MUNSON, *Sh'ff,*
By PLATT J. WISE, *Dep.*

Backed, viz: *Fi. fa.* No. 9160. Allen civil circuit court. Herman E. Stearns *et al. vs.* Reuben Gardner *et al.* Judgment, May 12th, 1873, without appraisement. Judgment, $2,212.85;
56 costs, bal. due, $4.70; execution, $1.50. Credits: Dec. 31, 1873, $354.93; June 7, 1874, $145.07. Return according to law. F. H. Wolke, clerk. Filed —— —, 187–. F. H. Wolke, clerk. Farrar and Farrar, plaintiffs' attorneys.

The sheriff will first exhaust the property of Gardner, Gardener, and Blish, principals.

EXHIBIT "F" TO BILL.

STATE OF INDIANA, *Allen County,* } ss:

State of Indiana to the sheriff of Miami county, Greeting:

Whereas heretofore, to wit, on the 12th day of May, 1873, Herman E. Stearns, Charles F. Stearns, and Moses Oppenheimer, by the consideration and judgment of the Allen civil circuit court, then pronounced and entered, recovered against Reuben Gardner, Andrew C. Gardner, and Henry Blish, as principals, and Jacob C.
57 Bowser, Joseph R. Prentis, and Daniel M. Falls, as sureties, judgment for the sum of twenty-two hundred and twelve dollars and eighty-five cents for damages in an action of debt, and also the further sum of four dollars and 70 cents for the balance of costs and charges about the recovery thereof in that behalf expended, whereof the said Reuben Gardner, Andrew C. Gardner, Henry Blish, Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls were convicted, as appears of record, therefore you are hereby commanded to levy the said sums of money of the property of the defendant within your bailiwick subject to execution, and have the money at the clerk's office, together with interest, at the rate of six per cent. per annum, on the amount of said judgment from the first day of January, 1877, to satisfy said judgment, interest, and costs; also one dollar and fifty cents for this writ; and return this writ within one hundred and eighty (180) days with your doings thereon.

58 In testimony whereof I, F. H. Wolke, clerk of said court, have hereunto set my hand and affixed the seal thereof this 9th day of October, 1877.

F. H. WOLKE, *Clerk.*

STATE OF INDIANA, *Miami County:*

This writ came to my hands on the 12th day of October, 1877; that immediately thereafter, of Gardner, Blish & Co., I demanded the money on the execution, which they, Henry Blish and Andrew C. Gardner, neglected and refused to pay, and after making diligent inquiry and diligent search for goods and property on which to

levy I could find no property of any kind on which to levy this writ belonging to said Gardner, Blish & Co. or any of them.

VINCINT O'DONALD, *Sh'ff.*

Peru, October 25th, 1877.

Sh'ff fees, $1.50.

(Backed:) *Fi. fa.* No. 9351. Allen civil circuit court.
59 Herman E. Stearns *et al.* against Reuben Gardner *et al.* Judgment, May 12th, 1873, without appraisement; int. 6%. Judgment, $2,212.85; costs, balance, $4.70; execution, $1.50. Credits: Dec. 31, 1873, $354.93; Jan'y 1, 1874, $145.07. Return according to law. F. H. Wolke, clerk. Filed December 11, 1877. F. H. Wolke, clerk. Farrar & Farrar, plaintiffs' attorneys.

The sheriff will first exhaust the property of Gardner, Gardner, and Blish, principals.

EXHIBIT "G" TO BILL.

Vendi. exponas.

HERMAN E. STEARNS *et al.*
against
REUBEN GARDNER *et al.* } No. 9465.

Judgment, May 12th '73,	$2,212 85
Costs accrued	27 60
This writ	2

Without appraisement.
60 Return according to law.

F. H. WOLKE, *Clerk.*

FARRAR & FARRAR,
Att'y- for Pl'ff-.

STATE OF INDIANA, } ss:
Allen County,

The State of Indiana to the sheriff of Allen county, Greeting:

Whereas heretofore, to wit, on the 12th day of May, 1873, Herman E. Stearns, Charles F. Stearns, Moses Oppenheimer, by the consideration and judgment of the Allen civil circuit court, then pronounced and entered, recovered against Reuben Gardner, Andrew C. Gardner, and Henry Blish, as principals, and Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls, as surities, judgment for the sum of twenty-two hundred and twelve (2,212) dollars and eighty-five cents for damages in an action of debt, and also the further sum of — dollars and — cents for the costs and charges thereof in that behalf expended, where*fore* the said Reubin Gardner, Andrew C. Gardner, Henry Blish, Jacob C. Bowser, Joseph R. Prentis,
61 and Daniel M. Falls were committed, as appears of record; And whereas, on the 12th day of June, 1877, a writ of

execution was duly issued by the clerk of said court, directed to you, which writ was on the 26th day of November, 1877, returned by you with the following endorsement of levy, viz: By virtue of this execution I have this 26th day of June, A. D. 1877, levied upon lots number- one hundred and sixteen and one hundred and seventeen, original or old plat of the city of Fort Wayne, Allen county, Indiana.

* * * * * * *

This execution is returned (no person bidding), levy endorsed. Cl'k will please issue *vendi.*

Nov. 26, 1877.

C. A. MUNSON, *Sheriff,*
By PLATT J. WISE, *Dep'ty.*

You are therefore hereby commanded that of the said property so levied upon and remaining unsold you cause to be made, according to law, said judgment, interests, and costs accrued and to accrue thereon, and on failure to realize from said property so taken by virtue of said execution the full amount of said judg-
62 ment, interest thereon, and costs, as well as accruing costs, you are commanded that of the other goods, chattels, lands, and tenements of the defendant- in your bailiwick you cause to be made the balance remaining unpaid of said judgment, interest, and costs, and that you have those moneys at the clerk's office of said court, according to law, to render unto said plaintiff his judgment, interest thereon, and costs; also two dollars for this writ, docketing, filing, return, &c., and that you have this writ before said judge of said court at the clerk's office within one hundred and eighty days from the date of the same.

In testimony whereof I, F. H. Wolke, clerk of said court, hereunto subscribe my name and affix the seal thereof, at Fort Wayne, this 26th day of November, 1877.

F. H. WOLKE, *Clerk.*

EXHIBIT "H" TO BILL.

HERMAN E. STEARNS *et al.*
against
REUBEN GARDNER *et al.* } No. 9764.

63

Judgment, May 12th, '73	$2,212 85
Int., 6 %	
Costs accrued	41 10
This writ	1 50

Without appraisment.
Return according to law.

FRANK H. WOLKE, *Clerk.*

ROB'T STRATTON,
Att'y for Pl'ff.

STATE OF INDIANA, } ss:
Allen County, }

The State of Indiana to the sheriff of Allen county, Greeting:

Whereas heretofore, to wit, on the twelfth day of May, 1873, Herman E. Stearns, Charles F. Stearns, and Moses Oppenheimer, by the consideration and judgment of the Allen civil circuit court, then pronounced and entered, recovered against Reuben Gardner, Andrew C. Gardner, and Henry Blish, as principals, and Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls, as surities, judgment for the sum of twenty-two hundred and twelve dollars and eighty-five cents for damages in an action of debt, and also the further
64 sum of forty-one dollars and ten cents for the costs and charges about the recovery thereof in that behalf expended, whereof the said Reubin Gardner, Andrew C. Gardner, Henry Blish, Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls were convicted, as appears of record.

And whereas, on the 12th day of June, 1877, a writ of execution was duly issued by the clerk of said court, directed to you, which writ was on the 26th day of November, 1877, returned by you with the following endorsement, viz: By virtue of this execution I have this 26th day of June, A. D. 1877, levied upon lot- numbered one hundred and sixteen (116) and one hundred and seventeen (117), original or old plat of the city of Fort Wayne, Allen county, Indiana.

* * * * * * *

This execution is returned (no person bidding) with levy endorsed.

CHARLES A. MUNSON, *Sheriff,*
By PLATT J. WISE, *Deputy.*

You are therefore hereby commanded that of the said
65 property so levied upon and remaining unsold you cause to be made, according to law, the said judgment, interest, and costs accrued and to accrue thereon, and on failure to realize from said property so taken by virtue of said execution the full amount of said judgment, interest thereon, and costs, as well as accruing costs, you are commanded that of the other goods, chattels, lands, and tenements of the defendant in your bailiwick you cause to be made the balance remaining unpaid of said judgment, interest, and costs, and that you have those moneys at the clerk's office of said court according to law, to render unto said plaintiff his judgment, interest thereon, and costs; also one dollar and fifty cents for this writ, docketing, filing, and return, and that you have this writ before said judge of said court at the clerk's office within one hundred and eighty days from the date of the same.

In testimony whereof I, F. H. Wolke, clerk of said court, have hereunto subscribed my name and affixed the seal thereof, at Fort Wayne, this 5th day of July, 1878.

F. H. WOLKE, *Clerk.*

66 EXHIBIT "I" TO BILL.

Fi. Fa.

Allen Civil Circuit Court.

HERMAN E. STEARNS *et al.*
against
REUBEN GARDNER *et al.* } No. 9765.

Judgment May 12, 1873.
Int., 6 %.

Judgment	$2,212 85
Costs accrued	42 60
Execution	1 50

Int. paid to Jan. 1, 1877, without appraisement.
Return according to law.

F. H. WOLKE, *Clerk.*

Filed Sept. 23, 1882.
ROBERT STRATTON,
Plaintiffs' Attorney.

STATE OF INDIANA, } ss:
Allen County,

State of Indiana to the sheriff of Allen county, Greeting:

Whereas heretofore, to wit, on the 12th day of May, 1873, Herman E. Stearns, Charles F. Stearns, and Moses Oppenheimer, by the consideration and judgment of the Allen civil circuit court, then
67 pronounced and entered, recovered against Reuben Gardner, Andrew C. Gardner, and Henry Blish, as principals, and Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls, as surities, judgment for the sum of twenty-two hundred and twelve dollars and 85 cents for damages in an action of debt; also the further sum of forty-one dollars and 10 cents for the costs and charges about the recovery thereof in that behalf expended—

Whereof the said Reuben Gardner, Andrew C. Gardner, Henry Blish, Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls were convicted, as appears of record, therefore you are hereby commanded to levy the said sums of money of the property of the defendant within your bailiwick subject to execution, and have the money at the clerk's office, together with interest, at the rate of six per cent. per annum, on the amount of said judgment from the date thereof, to satisfy said judgment, interest, and costs; also one dollar
68 and fifty cents for this writ; and return this writ within one hundred and eighty (180) days with your doings thereon.

In testimony whereof I, F. H. Wolke, clerk of said court, have hereunto set my hand and affixed the seal thereof this 6th day of July, 1878.

F. H. WOLKE, *Clerk.*

By virtue of this execution I have this eighth day of July, A. D. 1878, levied upon the following real estate (no personal property found whereon to levy), to wit: The east half of the northwest quarter of section seventeen (17), in township thirty north, of range thirteen east, excepting ten acres in the northeast corner of said quarter, and also excepting the right of way of the Pittsburg, Fort Wayne and Chicago railway, containing sixty-eight $\frac{85}{100}$ acres.

Also the south half of the south half of the southwest quarter of section eight, in township thirty north, of range thirteen east; also all of the north part of the west half of the northwest quarter
69 south of the Pittsburg, Fort Wayne and Chicago railroad, in the west half of the northwest quarter of section seventeen, township thirty north, of range thirteen east, containing twenty-three $\frac{5}{100}$ acres, all in Allen county, Indiana.

CHARLES A. MUNSON. *Sheriff*,
By PLATT J. WISE, *Deputy*.

Came to hand July 6, 1878, at 11.30 o'clock a. m., and I advertised the within-described real estate by first giving due and legal notice of the time and place of sale, for at least twenty days next before the day of sale, by posting printed notices thereof in three of the most public places in Adams township and one at the court-house door of Allen county, Indiana, and also by publication for three weeks successively next before the day of sale in the Fort Wayne Weekly Sentinel, a weekly newspaper of general circulation printed and published in said county. Said sale was set for the third day of August, 1878, and I did on said day, at the door of the court-house of said county, between the hours prescribed by
70 law, at public auction, first expose to sale the rents and profits, for a term not exceeding seven years, of said real estate, in parcels as follows:

1st. The east half of the northwest quarter of section seventeen, except ten acres in the northeast corner and the right of way of the Pittsburg, Fort Wayne and Chicago railroad.

2d. The south half of the south half of the southwest quarter of section eight.

3d. The two last above described pieces together.

4th. All the north part of the west half of the northwest quarter of section seventeen which lies north of the Pittsburg, Fort Wayne and Chicago railroad; all the above land being in township thirty north, of range thirteen east.

5th. The entire descriptions as above set forth; and, no person bidding at any or either offer, I then and there offered at public auction as aforesaid the fee simple of said real estate in parcels as follows:

71 1st. The east half of the northwest quarter of section seventeen, in township thirty north, of range thirteen east, except ten acres in the northeast corner and excepting the right of way of the Pittsburg, Fort Wayne and Chicago railroad.

2d. The south half of the south half of the southwest quarter of section eight, township and range aforesaid.

3d. The two pieces of real estate last above described.

4th. All the south part of the west half of the northwest quarter of section seventeen, township and range aforesaid, which lies north of the Pittsburg, Fort Wayne and Chicago railroad, and, receiving no bid at any or either offers, I did then and there offer at public auction as aforesaid the fee simple of all of said real estate described as follows, to wit:

The east half of the northwest quarter of section seventeen (17), in township thirty (30) north, of range thirteen east, except-
72 ing ten acres in the northeast corner of said quarter, and also excepting the right of way of the Pittsburg, Fort Wayne and Chicago railroad, containing sixty-eight and eighty-five one-hundredths acres; also the south half of the south half of the southwest quarter of section eight, in township thirty north, of range thirteen east, and also all of the north part of the west half of the northwest quarter north of the Pittsburg, Fort Wayne and Chicago railroad, in the north half of the northwest quarter of section seventeen, township thirty north, of range thirteen east, containing twenty-three and five-hundredths acres; all the above lands in Allen county, Indiana.

And John H. Bass did then and there bid the sum of two thousand dollars, and, no person bidding more, the same was in due form openly struck off to the said John H. Bass, he being the highest and best bidder therefor and that being the highest and best price bid for the same; and, the said John H. Bass having
73 paid the amount so by him bid, I executed and delivered to him a certificate of sale of said premises; and I have paid to

the plaintiffs' attorneys	$1,911 50
Paid clerk	44 10
" printer	12 00
Retained my fees	32 40
	$2,000 00

And this execution is returned partially satisfied. Sept. 9, 1878.

C. A. MUNSON, *Sheriff A. Co.*,
By PLATT J. WISE, *Dept.*

Received of Charles A. Munson, sheriff, one thousand eight hundred dollars to apply on this execution.

August 8, 1878.

J. L. FARRAR,
Pl'ff's Att'y.

EXHIBIT "J" TO BILL.

This indenture, made this eighth day of June, A. D. 1882, between Franklin K. Cosgrove, Jr., sheriff of Allen county, in the State of Indiana, of the first part, and George Milmine, of the county of and State of ——, of the second part, witnesseth:

That whereas, at the November term of the superior court
74 of Allen county, A. D. 1878, George Milmine recovered by judgment of said court in a certain action therein against Jacob C. Bowser and others six thousand eight hundred and thirty dollars for his damages, together with the further sum of fifty-four dollars and seventy-five cents for his costs in that behalf expended, and a decree for the sale of all the interest, estate, right, and title of the defendants, Jacob C. Bowser and others, in and to certain real estate described therein as follows, viz: The south half of the south half of the southwest quarter of section eight, township thirty north, of range thirteen east; also the east half of the northwest quarter of section seventeen (17), town. thirty (30) north, range thirteen east, except ten acres in the northeast corner and the right of way granted to the Ohio and Indiana Railroad Company; and also all that part of the west half of the northwest quarter of section seventeen (17), town. thirty (30) north, of range thirteen (13) east, which lies north of the grant of the Ohio and Indiana Railroad Company,
75 containing twenty-three acres, in Allen county, Indiana; all without any relief whatever from valuation or appraisement laws, as by the record thereof remaining in said court more fully appears.

And whereas afterwards, to wit, on the twenty-eighth day of January, 1879, a copy of said judgment and decree was duly issued, under the seal of said court, attested by the clerk thereof, directed to the sheriff of said county, commanding him that, after due and legal notice of the time and place of making the same, he should sell the land above described, with all the interest, estate, right, and title of the defendants, Jacob C. Bowser and others, therein, or so much and such parts thereof as might be necessary, according to the terms of said decree, to pay and satisfy the judgment aforesaid, with the interest and costs thereon, and that he should, in like manner, also make and return all interest and accruing costs
76 thereon and make due return of said writ to the clerk's office at the expiration of one hundred and eighty days from the date of the same;

And whereas said copy of judgment and order of sale, on the twenty-ninth day of January, A. D. 1879, came to the hands of the Sheriff of said county to be executed, and the sheriff, as aforesaid, having legally advertised the same, did, on the first day of March, A. D. 1879, at the door of the court-house, in said county, between the hours prescribed by law, at public auction, first expose to the sale the rents and profits for a term not exceeding seven years of said estate of Jacob C. Bowser and others in and to said above-described real estate, and no person bidding for the same, he then offered at public auction, aforesaid, all the rights, title, and interest in fee simple of said Jacob C. Bowser and others in and to said real estate, and the said George Milmine did then and there bid
77 the sum of seven thousand and forty-eight dollars and seventy cents and, no person bidding more, the same was in due form openly struck off and sold to the said George Milmine for the said sum of seven thousand and forty-eight dollars and seventy cents, he

being the highest bidder and that being the highest price bid for the same;

And whereas also, on the first day of March, A. D. 1879, as required by law, said sheriff executed to said sheriff a certificate setting forth the foregoing facts, with the conditions appended that if said premises were not redeemed within one year from the date thereof, by payment of the purchase-money, with ten per cent. interest thereon, by said judgment defendant-, Jacob C. Bowser and others, their heirs or assigns, to said purchaser, his heirs or assigns, said George Milmine would be entitled to a deed of conveyance thereof:

Now, therefore, to confirm to said George Milmine the sale
78 so made as aforesaid, the said Franklin K. Cosgrove, Jr., as sheriff as aforesaid, in consideration of said sum of seven thousand and forty-eight dollars and seventy cents to Charles A. Munson, then the sheriff, then in hand paid to said George Milmine, the receipt whereof is hereby acknowledged, and of the non-redemption of said real estate as described in said order of sale, as provided by law, hath granted, bargained, and sold, and doth by these presents grant, bargain, sell, convey, and confirm, to the said George Milmine, his heirs and assigns forever, all the following real estate, situate in the county of Allen and State of Indiana, to wit:

The south half of the south half of the southwest quarter of section eight, town. thirty (30) north, of range thirteen (13) east.

Also the east half of the northwest quarter of section seventeen (17), town. thirty (30) north, of range thirteen east, except ten acres
in the northeast corner and the right of way granted to the
79 Ohio and Indiana Railroad Company; and also all that part of the west half of the northwest quarter of section seventeen, town. thirty (30) north, of range thirteen (13) east, which lies north of the grant of the Ohio and Indiana Railroad Company, containing twenty-three acres, in Allen county, Indiana:

To have and to hold all and singular the premises aforesaid, with the privileges and appurtenances, to the said George Milmine, his heirs and assigns forever, in as full and ample a manner as the same was held by Jacob C. Bowser and others, defendants, immediately before the execution of the mortgage mentioned in said decree foreclosing the same.

In witness whereof the said Franklin K. Cosgrove, Jr., as sheriff as aforesaid, has hereunto set his hand and seal the day and year above written.

FRANKLIN K. COSGROVE, JR., [SEAL.]
Sheriff of Allen County.

STATE OF INDIANA, }
Allen County, } ss:

Before me, Martin V. B. Spenser, clerk of the Allen circuit
80 court in and for said county, personally came Franklin K. Cosgrove, Jr., sheriff of said county, and acknowledged the foregoing conveyance to be his voluntary act and deed.

In witness whereof I hereunto subscribe my name and
[SEAL.] affix the official seal of office this eighth day of June, A. D. 1882.

MARTIN V. B. SPENCER, *Clerk*,
By WILLIS D. MAIER, *Dep.*

81 And now comes the defendant, J. H. Bass, by R. S. Taylor and Coombs, Bell, and Morris, his solicitors, and files herein his separate answer to said amended bill of complaint in these words:

This defendant, now and at all times hereafter saving and reserving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereunto, or to so much thereof as this defendant is advised that it is material or necessary for him to make answer to, answering, saith that he admits the execution of the notes by Jacob C. Bowser and the mortgage by Bowser and wife to said David Smith at the time, for the sum, and upon the conditions described in said mortgage, as charged in said complainant's bill. He also admits the death of said Smith, the assignment of said notes and mort-
gage by his executor to said complainant, the foreclosing
82 of said mortgage, and the sale and conveyance of said mortgaged premises, as charged in said complaint. This defendant also admits that on the 12th day of May, 1873, Herman E. Stearns, Charles F. Stearns, and Moses Oppenheim recovered a judgment in the Allen circuit court against Reuben Gardner, Andrew C. Gardner, and Henry Blish, as principals, and Jacob C. Bowser, Joseph R. Prentiss, and Daniel M. Falls, as sureties, as in said bill alleged. He also admits that said principal debtors made small payments on said judgment from time to time; that they paid interest on said judgment in advance from the 20th day of July, 1876, to the first day of January, 1877, and in consideration thereof said judgment plaintiff agreed that no execution should be issued on said judgment during that time, as charged in said bill of complaint; but he denies that said Bowser, Prentiss, and Falls were
thereby released from said judgment, or that said judgment
83 was satisfied as to them, the said Bowser, Prentiss, and Falls having consented and agreed to such delay in the issuance of an execution on said judgment.

This defendant, further answering, says he believes it to be true that said Stearns *et al.* caused an execution to be issued on said judgment on the 12th day of June, 1877, and that the same was levied on said lots 116 and 117 on the original plat of the city of Fort Wayne, and that said lots were twice offered for sale on said execution, but not sold for want of bidders, as in said bill alleged, and that another execution was issued to Miami county and returned *nulla bona*, as therein stated. He further admits that a *venditioni exponas* was issued, and said lots 116 and 117 were again offered for sale thereon, but not sold for want of bidders, and that said *vendi.* was returned and an *alias* execution issued on said judgment, and

levied on the lands described in said complainant's mortgage;
84 but this defendant denies that he ever entered into any combination, conspiracy, or agreement with said Herman E. Stearns, Charles F. Stearns, and Moses Oppenheim and their attorney, or the said Jacob C. Bowser and Charles Munson, or any or either of them, for the corrupt purposes charged in said bill of complaint or for any other purpose whatever; and this defendant also denies that he ordered or directed the issue or return of the said several executions or writs of *vendi.* or the levying of the same or the releasing of said levy, and he avers that he never had any consultation with the plaintiffs in said judgment or their attorney in reference thereto.

And said defendant, further answering, says that at the time said proceedings were had he was informed and believed that said complainant held the said mortgage, and that suit was pending to foreclose the same, and that said complainant resided at Toledo, Ohio, but he denies that he directed or advised the publication of
85 the notice of the sale of said land or any land to be made in the Fort Wayne Sentinel, as charged in said bill of complaint.

This defendant, further answering, says that he has no means of knowing the extent of the circulation of said Fort Wayne Sentinel, but he is informed and believes that it was legally qualified to make such publications, and that all or nearly all the advertisements of sales of land on execution in said county had been for many years made in that paper; and he expressly denies that he ever did any act or resorted to any means to prevent the said complainant from having notice of the sales of said Bowser's lands or any of them or any of said executions or from redeeming the same, and if said complainant did not know what had been done in the premises it was not the fault of this defendant, nor did he expect or believe that any act of his or any other person to his knowledge would prevent
86 said complainant from attending said sales or from redeeming said lands from said sale, but, on the contrary thereof, he did expect that said complainant would redeem said land.

This defendant, further answering, says that he is informed and believes that the said Jacob C. Bowser at the time the said Stearns judgment was rendered did not own all the real estate set forth and described in said bill, and that the value of some parts thereof is therein greatly overstated; and he says further that all the real estate of the said Jacob C. Bowser in which he claims any interest was purchased by him on execution and tax sales, as hereinafter stated, and he now submits a full and complete statement of the facts and circumstances under which he was compelled to become the purchaser of the real estate of said Jacob C. Bowser, with a description of the lands so by him purchased. This respondent had been for a long — an accommodation indorser
87 for the firm of J. C. Bowser & Co., composed of the said J. C. Bowser, Joseph R. Prentiss, and Daniel M. Falls, and on the 6th day of November, 1876, he was bound as such indorser on the following notes, to wit: One note of $11,200.00, dated September

28th, 1876, and payable to the Fort Wayne National Bank 90 days after date thereof; one note of $509.61, dated September 28th, 1876, and payable 60 days after the date thereof to said Fort Wayne National Bank; one note for $6,800.00, dated September 28th, 1876, payable to the Hamilton Bank 90 days after the date thereof; one note for $671.00, dated September 28th, 1876, payable 60 days after the date thereof to said Hamilton Bank, and one other note for $3,000.00, dated September 28th, 1876, and payable 90 days thereafter to one John M. Miller, at the First National Bank of Fort Wayne; all of which notes were payable with interest at the rate of ten per centum per annum after maturity, with five per cent., attorneys' fees, and waiving appraisement; and on said 6th day of November, 1876, this defendant, fearing that said Bowser, Prentis, and Falls would be unable to pay said notes, and being un-
88 willing to further endorse for them without some security therefor, the said Jacob C. Bowser executed and delivered to this defendant a mortgage on the lands therein described to secure this defendant as such indorser, a copy of which is filed herewith, marked Exhibit "A," which he prays may be taken as part of this his answer.

And said defendant, further answering, says that on the 4th day of November, 1876, the said Joseph R. Prentis and Daniel M. Falls, with their wives, executed to this defendant a mortgage conveying to him, as security for the same liabilities aforesaid, the undivided half of lots 117 and 118 on the original plat of the city of Fort Wayne and the undivided half of lots 565, 566, and 567, in Hanna's Addition to said city, together with undivided half of all the fixtures, machinery, tools, patterns, and other personal property appertaining to and used in the business carried on on said lots; of which mortgage a copy is filed herewith, marked Exhibit "B," which
89 he prays may taken as a part of this his answer.

And said defendant, answering further, says that before the date of the execution of said mortgages said Jacob C. Bowser had sold his interest in the lands and personal property described in the last-mentioned mortgage, said interest being the undivided one-half thereof, to Neil McLachlan and Charles L. Olds, and received from them as part of the consideration of said sale seven notes for $2,000.00 each, which notes the said Jacob C. Bowser deposited with the Fort Wayne National Bank as collateral security for the payment of the notes hereinbefore mentioned, upon which this defendant was surety, and some other notes of J. C. Bowser & Co., to which this defendant was not a party, which notes of said McLachlan and Olds were not, however, payable in bank and were open to any defense which might arise from failure of title to the property for *for* which they were given by reason of prior incumbrances
90 thereon, of which there were many, as will hereafter more fully appear.

And said defendant, answering further, says that said Prentiss and Falls had no property upon which they could give this defendant any security for said indebtedness except that embraced in the mortgage executed by them as aforesaid, and that on the — day of

—— said Bowser, Prentiss, and Falls were all adjudicated bankrupts in the district court of the United States for the district of Indiana.

And said defendant, answering further, says that after the execution of said mortgages and the deposit of collaterals as aforesaid he continued to sign as security for said J. C. Bowser & Co. other notes in renewal of the notes then existing from time to time until the fall of 1878, when the said Jacob C. Bowser & Co. having become bankrupt as aforesaid and wholly unable to pay the said notes, this defendant paid and took them up, except the note of the said John M. Miller, said notes amounting in all to the sum of
91 $16,116.33, and that he took up said notes, payable to said John M. Miller, in July, 1880, there then being due upon them for principal and interest the sum of $4,444.47, making in all, with interest, the sum of $22,560.80; and said defendant, answering further, says that after the execution of said mortgages to him as aforesaid he caused an investigation to be made of the title to the lands embraced in said mortgages, and found to his surprise that they were so encumbered by mortgage, judgment, and tax liens that it was doubtful whether they would sell for enough to discharge the liens thereon superior to his said mortgages; that the following schedule is a full and true statement of the mortgage and judgment liens upon the lands or some part of them embraced in said mortgages and superior thereto, as the defendant believes, together with a list, as full and accurate as the defendant is now able to make, of the tax liens then existing against the same:

92 Mortgages:

M. E. Woodward, April 23, 1869, balance due, about	$2,800 00
Annie C. Ketcham, December 7, 1870	4,000 00
Frederick Hartmeyer, December 19, 1872	5,000 00
Caroline Nuttman, January 27, 1874	4,000 00
Joseph D. Nuttman, May 18, 1874	10,000 00

Judgments Allen common pleas:

E. Kegg, February 23, 1873	66 24
Costs	24 30
W. H. Bloom *et al.*, February 26, 1873	171 50
Costs	38 13

Judgments Allen circuit court:

J. I. Mills *et al.*, February 13, 1871	1,105 00
Costs	16 50
D. Shaw, May 6, 1872	35 84
Costs	29 25
R. Kearns, June 13, 1872	62 00
Costs	46 63
E. Ney, June 17, 1872	700 00
Costs	173 23
First National Bank, Cambridge, February 13, 1873	1,452 39
Costs	13 38

H. E. Stearns *et al.*, May 12, 1873		2,212 85
Costs		15 30
J. Williams, November 5, 1873		90 00
Costs		18 65
C. H. Reed, March 29, 1875		530 50
93 Costs		14 53
Phillips & J. Iron Co., September 9, 1875		198 74
Costs		14 40
Hamilton Bank, February 7, 1876		840 72
Costs		10 05
S. C. Evans, April 5, 1876		553 12
Costs		10 35
D. Noyes, February 17, 1876		444 74
Costs		10 22
J. S. Reed, trans., April 20, 1876		98 84
Costs		3 80
Weller & Bro., trans., April 20, 1876		132 61
Costs		8 85
I. Lauferty, April 17, 1876		279 58
Costs		12 85
Huron Iron Company, April 17, 1876		256 58
Costs		26 90
T. Swank *et al.*, April 17, 1876		221 33
Costs		8 00
Fort Wayne National Bank, April 18, 1876		536 33
Costs		11 85
J. M. Sharpe, June 7, 1876		169 68
Costs		11 85
J. Kirby, June 7, 1876		285 94
Costs		14 50
East Ky. R. R., June 8, 1876		266 58
Costs		10 86
S. J. Wiley *et al.*, June 21, 1876		941 61
94 Costs		11 65
L. Trexler, March 31, 1876		630 50
Costs		12 40
J. W. Herron, September 6, 1876		725 46
Costs		20 56
F. Kanning, October 25, 1876		122 50
Costs		15 68
F. Kanning, October 25, 1876		106 17
Costs		14 95

Taxes:

S. ½,	sec. 27, 31, 13	935 70
N. W. ¼,	" 34, 31, 13	318 86
Pt.	" 17, 30, 13	692 11
S. ½ S. ½ S. W. ¼,	" 17, 30, 13	182 46
W. end, N. ½ S. W. ¼,	" 6, 30, 15	50 00
E. ½ S. W. ¼,	" 16, 30, 12	30 72
S. ½ S. W. ¼,	" 30, 31, 15	146 11

S. E. ¼ S. E. ¼, sec. 34, 29, 15	20 39
Lots 116 & 117, O. P.	860 24
Lots 34, 44, 45, 46, 48, Bowserville	199 25

And said defendant, further answering, says that when it came to his knowledge that there were thus $43,092.91 of liens upon the property mortgaged to him prior to his mortgage, it seemed to him that there were but three possible courses open to him, viz.,
95 to sit by and suffer his entire security to be exhausted in satisfaction of said prior liens, as it certainly would be unless prevented by this defendant, or to advance himself the large sum necessary to redeem said prior liens, or to attend such sales as should from time to time be made by the various lienholders and protect his interest in each piece of property sold by bidding on the same when necessary; that upon reflection the last course seemed to him the wisest and best, and was adopted; that he accordingly attended every execution sale that came to his knowledge of any of the property of said Jacob C. Bowser and bid upon every piece of property so offered which had, in his judgment, any value above specific liens thereon prior to the lien upon which it was offered; that at all such sales this defendant was seeking only to protect his subsequent liens by preventing sacrifice of the property of said Bowser upon the prior liens, and that he did not seek and did not have, as he
96 believes, any advantage over any other bidder or creditor.

Said defendant, further answering, says the following is a full statement of all the purchases made by him of lands of said Bowser at execution, mortgage, or tax sale, viz:

On the 8th day of September, 1877, the northeast quarter of the southeast quarter of section 27, township 31 north, of range 13 east, was duly offered by the sheriff of said county upon an execution issued on a judgment in favor of Daniel Noyes and William D. Wines, rendered on the 17th day of February, 1876, for the sum of $444.94 and costs, and this defendant bid therefor the sum of $350, and, he being the highest and best bidder therefor, the same was openly struck off and sold to him.

And on the first day of December, 1877, the southeast quarter of the southeast quarter of the same section was duly offered for sale by said sheriff on the same execution, and this defendant bid
97 therefor the sum of $140.00; no person bidding more, the same was openly struck off and sold to him for that sum.

And on the 13th day of January, 1877, the undivided half of the east half of the southwest quarter of section 16, township 30 north, range 15 east, was duly offered for sale by said sheriff upon an execution issued on a judgment in the Allen circuit court, at its April circuit court, at its April term, 1876, in favor of the Fort Wayne National Bank, for the sum of $536.33 and costs, and this defendant bid therefor the sum of $50.00, and, no person bidding more, the same was openly struck off and sold to him for that sum.

And on the 26th day of January, 1878, the west half of the southeast quarter of said section 27, town. 31, range 13, was duly offered for sale by said sheriff on the same execution, and this defendant

bid therefor the sum of $428.97, and, no person bidding more, the same was struck off to him for that sum.

And on the 23d day of December, 1876, the northwest fractional quarter of section 34, town. 31, range 13, was duly
98 offered by said sheriff upon an execution issued upon a judgment rendered in the Allen circuit court, at its February term, 1876, in favor of Samuel C. Evans against said J. C. Bowser & Co., for the sum of $553.12, and this defendant bid therefor the sum of $650.00, and, no person bidding more, the same was openly struck off and sold to him for that sum.

And on the same day lot 34, in Bowserville, was offered for sale by said sheriff on an execution issued on a judgment in the Allen circuit court, rendered at its April term, 1876, for the sum of $221.33 and costs, in favor of Thomas and Christopher Swank, and this defendant bid therefor the sum of $200.00, and, no person bidding more, the same was openly struck off and sold to him for that sum.

And on the 13th day of January, 1877, sixty acres off of the west side of the north half of the southwest quarter of section 6, town. 30, range 15, was duly offered for sale by said sheriff upon an
99 execution issued upon a judgment rendered in the Allen circuit court, at its April term, 1876, in favor of the Fort Wayne National Bank, for the sum of $536.33 and costs of suit, and this defendant bid therefor the sum of $230.00, and, no person bidding more, the same was openly struck off and sold to him for that sum.

And on the 23d day of December, 1876, the west half of the southwest quarter of section 27, town. 31, range 13, was duly offered for sale by said sheriff upon an execution issued upon a judgment rendered in the Allen circuit court, at its February term, 1876, in favor of the Hamilton Bank, for the sum of $840.72, and this defendant bid therefor the sum of $960.00, and, no person bidding more, the same was openly struck off and sold to him for that sum.

And on the 10th day of January, 1880, lot No. 44, in Bowserville, was duly offered for sale by said sheriff upon an execution issued to said sheriff upon a judgment rendered in the Allen
100 circuit court, at its November term, 1871, in favor of Joseph Mills and Bellville Kline, for the sum of $1,105.00 and costs of suit, and this defendant bid therefor the sum of $200.00, and, no person bidding more, the same was openly struck off and sold to him for that sum.

And on the 10th day of January, 1880, lot No. 46, in Bowserville, was duly offered for sale upon an execution issued upon the last-named judgment, and this defendant bid therefor the sum of $233.34, and, no person bidding more, the same was openly struck off and sold to him for that sum.

And on the day last aforesaid the east half of the southwest quarter of said section 27, town. 31, range 13, was duly offered for sale by said sheriff upon the same last-named execution, and this defendant bid therefor the sum of $1,933.34, and, no person bidding more, the same was openly struck off and sold to him for that sum.

101 And on the same day last aforesaid lot 48, in Bowserville,

was, in like manner, offered for sale by said sheriff upon said last-named execution, and this defendant bid therefor the sum of $200.00, and, no person bidding more, the same was openly struck off and sold to him for that sum.

And on the day last aforesaid lot 45, in Bowserville, was, in like manner, offered for sale by said sheriff upon the last-mentioned execution, and this defendant bid therefor the sum of $233.34, and, no person bidding more, the same was openly struck off and sold to him for that sum; and, none of said sales having been redeemed within the time limited therefor, said sheriff has executed and delivered deeds for the several tracts of land so sold to him; all of which several sales were upon executions against said Jacob C. Bowser and others.

This defendant, further answering, says that at the time said lots 116 and 117 were so levied on and offered for sale, as charged
102 in said plaintiff's complaint, they were incumbered by a decree of foreclosure for the sum of $6,455.25 and costs of suit in favor of one Frederick Hartmeyer foreclosing a mortgage on said lots executed by said Bowser and wife on the 19th day of December, 1872, and said lot 117 was also incumbered by a deed from the county auditor to one John Langohr upon a sale of said lot for county taxes for the years 1873 and 1874 and subsequent taxes paid thereon, and said lot 116 was also incumbered by delinquent county taxes to the amount of about $200.00, and said lots 116 and 117 were also incumbered by delinquent city taxes in the sum of about $550.00; that when said lots were first offered for sale upon the said execution in favor of said Stearns and others he attended said sale, intending to bid for said lots, but, upon ascertaining the amount and nature of said incumbrances, he declined to bid, said incumbrances being more than he was willing to give for said lots, and, no person bidding therefor, said execution was returned, No sale
103 for want of bidders, and that said lots were again offered on said execution, but not sold for want of bidders.

Said defendant says further that at the time said lots 116 and 117 were offered for sale under said Stearns' judgment on the executions aforesaid they were also encumbered by the following judgment liens, all of which were prior to the lien of said Stearns' judgment, to wit:

Allen common pleas court:

Judgment, E. Kegg, Feb'y 23, 1873	66	24
Costs on same	24	30
" W. H. Bloom *et al.*, Feb'y 26, 1873	171	50
Costs on same	38	13

Allen circuit court:

" I. F. Mills *et al.*, Feb'y 13, 1871	1,105	00
Costs on same	16	50
" D. Shaw, May 6, 1872	35	84
Costs on same	29	25
" Rob't Kearns, June 13, 1872	62	00

Costs on same	46	63
Judgment, Ed. Ney, June 17, 1872	560	00
Costs on same	173	23
" First Nat'l B'k, Cambridge, Feb. 13, '73	1,452	39
Costs on same	13	38
104 Judgment, Jno. S. Reed, Oct. 26, '72 (*Ap. 20, '76?)	98	84
Costs on same	3	80
Judgment, Weller & Bro., Oct. 26, '72 (*Ap. 20, '76?)	132	61
Costs on same	8	85
Accrued interest, approximate	1,332	68
	5,371	17

This defendant, further answering, says that he is informed and believes that said Stearns and others afterwards caused writs of *venditioni exponas* to issue, upon which said lots were again offered for sale by said sheriff, but not sold for want of bidders, after which the said Stearns *et al.* abandoned said levy and caused an *alias* execution to be issued on said judgment and directed the same to be levied upon the lands so mortgaged to said Smith, all of which was done without any attempt by this defendant to control the acts of said Stearns and others or the said sheriff.

The defendant, further answering, says that on or about the 25th day of January, 1878, the said Hartmeyer offered to sell his said judgment and decree of foreclosure for less than the amount
105 thereof, and this defendant purchased the same and took an assignment thereof, and on the 11th day of February, 1878, he purchased said lot 116 at the regular tax sales for that year for the sum of $211.48, and, the said tax sales not being redeemed, the county auditor executed and delivered to him a tax deed for said lot on the 20th day of November, 1881. This defendant further says that on the 26th day of April, 1878, he paid taxes by the city of Fort Wayne on said lots for the years 1873, 1874, 1875, 1876, and 1877, amounting to the sum of $559.41, and on the 7th day of March, 1878, he purchased the said incumbrances so held by said Langohr for the sum of $236.19 and took his quitclaim deed for said lot 117, and this defendant has paid the county and city taxes assessed upon said lots for the years 1878, 1879, 1880, and 1881, amounting to the sum of $671.09.

This defendant, further answering, says that on the 22d day of February, 1882, he caused an order of sale to be issued on
106 the decree so assigned to him, upon which the *the* said lots 116 and 117, in the city of Fort Wayne, were offered for sale by said sheriff on the 25th of March, 1882, at the court-house door in said county, and was bid in by this defendant for the sum of $8,531.07, being the amount of said decrees, interest, and costs, which, together with said several sums so paid for taxes and in redemption of tax liens, amounting to the sum of $1,678.17, and making the cost of said lots to the defendant at this time the sum

* Words and figures enclosed in parentheses in pencil in original.

of $10,209.24, which he believes is now the full value of said lots, but, if not, they are still redeemable.

This defendant, further answering, says that on the 6th day of July, 1878, an *alias* execution was issued upon the said judgment in favor of Stearns and others against said Jacob C. Bowser and others, which was levied by the said Charles A. Munson, sheriff as aforesaid, on the lands so mortgaged to said Smith, to wit, the east half of the northwest quarter of section 17, in township 30 north, of range
13 east, excepting ten acres in the northeast corner thereof,
107 and also excepting the right of way of the Pittsburgh, Fort Wayne and Chicago railroad, containing 68.85 acres, and also all of the north part of the west half of the northwest quarter north of said railroad in the west half of the northwest quarter of said section 17, containing twenty-three acres and $\frac{5}{100}$ of an acre, and also the south half of the south half of the southwest quarter of section 8, in the same township and range, all in Allen county, Indiana, who advertised the same for sale at the court-house door in said county on the 3rd day of August, 1878, at which time and place the said sheriff, having offered said lands in parcels and receiving no bids therefor, he then offered them entire; this defendant bid for said lands the sum of $2,000.00, and, no person bidding more, the same was openly struck off and sold to this defendant for that sum, and, the same not having been redeemed within the year allowed by law, the said sheriff, on the 17th day of November, 1879, executed and delivered to this defendant a deed therefor.

108 And this defendant says that at the time of said last-mentioned sale to him said lands so sold to him, being the same lands described in plaintiff's mortgage, were encumbered, as this defendant is informed, by the following liens prior to the judgment upon which it was sold as aforesaid and which remained liens upon it in the hands of this defendant after his said purchase:

Allen common pleas:

E Kegg, February 23, 1873	60 24
Costs	24 30
W. H. Bloom *et al.*, February 26, 1873	171 50
Costs	38 13

Allen circuit court:

I. F. Mills *et al.*, February 13, 1871	1,105 00
Costs	16 50
D. Shaw, May 6, 1872	35 84
Costs	29 25
Robert Kearns, June 13, 1872	62 00
Costs	46 63
E. Ney, June 17, 1872	560 00
Costs	173 23
First Nat'l Bank, Cambridge, Feb'y 13, 1873	1,452 39
Costs	13 38
109 John S. Reed, October 26, 1872	98 84
Costs	3 80

Weller & Bro., October 26, 1872	132 61
Costs	8 85
Interest accrued, approximate	1,332 68
Taxes, interest, and penalties	1,220 26
	6,591 43

Said defendant, answering further, says that at the time of the sale of the lands last above described to him upon said execution upon said Stearns' judgment he had no actual knowledge or notice of any payments upon said judgment; that he has inquired into the facts since said sale and since the beginning of this suit and is informed and believes that there was paid to the plaintiff upon said judgment Dec. 31, 1873, $354.93; Jan'y 7, 1874, $145.07, after which interest was paid on the residue until January 1, 1877, and that there was due on said judgment at the time of said sale $1,971.06, besides costs; that there was endorsed on said execution a memo-
randum to the effect that interest had been paid to Jan. 1,
110 1877, but the two payments of $354.93 and $145.07 above mentioned were not endorsed on said execution and did not appear upon said judgment; but the said defendant denies expressly that he had any knowledge or notice at the time of said sale or before that the said execution was for any larger sum than was really due on said judgment.

Said defendant, further answering, says that his appearance in said suit of the complainant for foreclosure of his said mortgage was entered on the first day of July, 1878, and withdrawn on the 8th day of July, 1878, and on the same day last aforesaid a default was entered against him in said cause; that no further notice was served on him in said cause after said default, nor did he appear further in the same; that the judgment and decree in said cause, so far as it affected this defendant, rested solely on said default, and that
111 the purchase by this defendant of the lands aforesaid upon said execution issued upon said judgment of Stearns *et al.* was long after said default had been taken and entered as aforesaid.

And this defendant, further answering, says that on the 18th day of February, 1882, the undivided half of the east half of the southwest quarter of section 33, township 30, range 14, was offered for sale by Franklin P. Cosgrove, sheriff of said county, at the courthouse door in said county, on sundry executions, one in favor of David Shaw, issued upon a judgment in the Allen circuit court, rendered on the 6th day of May, 1872, against said Jacob C. Bowser and others, for the sum of $161.50 and costs of suit; also one execution from the Allen circuit court, issued upon a transcript of a judgment from the docket of Michael Tansey in favor of John S. Reed against said Jacob C. Bowser and others, on the 26th of October, 1872, for the sum of $98.84 and costs, which transcript was filed in the clerk's office of said court on the 20th day of April, 1876; also one other execution from said
112 Allen circuit court upon a transcript of a judgment on the docket of said Michael Tansey, rendered on the 26th day of

October, 1872, in favor of Weller and Brother against said Bowser and others for the sum of $132.61, which transcript was filed in said clerk's office on the 20th day of April, 1876, and one other execution in favor of Robert Kearns, issued upon a judgment in said Allen circuit court, rendered on the 13th day of June, 1872, in favor of said Kearns against said Jacob C. Bowser and others for the sum of $132.68, and costs of suit, and this defendant bid therefor the sum of $715.00, and, no person bidding more, the same was openly struck off and sold to him for that sum, who now holds the sheriff's certificate of said sale; and on the 23d day of September, 1882, the south half of the southwest quarter of section 30, township 31, range 15, containing eighty acres; the southeast quarter of the southeast quarter of section 34, township 29, range 15, containing 40
113 acres; also all the right, titles, and interest of the said Jacob C. Bowser in the south half of the south half of the northeast quarter of section 32, town. 30, range 14, supposed to contain 12.75 acres; also the southwest quarter of section 32, town. 30, range 14, supposed to contain 59.60 acres, was in like manner offered for sale by said sheriff upon an execution issued upon a judgment in the said Allen circuit court, rendered on the 30th day of December, 1876, in favor of the First National Bank of Fort Wayne against the said Jacob C. Bowser and others for the sum of $2,156.52, and costs of suit, and this defendant bid therefor the sum of $410.00, and, no person bidding more, the said lands were openly struck off and sold to him for that sum, and he now holds the sheriff's certificate therefor; and on the 23d day of September, 1882, lots one, two, three, four, nine, eleven, twelve, thirteen, fifteen, sixteen, seventeen,
114 and eighteen, in the 2d Addition to the town of Maples, were in like manner offered for sale by said sheriff upon an execution issued upon the last-mentioned judgment, and this defendant bid for said lots the sum of $60.00, and, no person bidding more, said lots were openly struck off and sold to him for that sum, and for which he now holds the sheriff's certificate; and on the same day last aforesaid all the interest of said Jacob C. Bowser in and to that part of the west half of the southeast quarter of section 32, town. 30, range 14, lying north of the railroad, containing 15 acres; also part of the southwest quarter of the southeast quarter of said section 32, containing 15 acres, and that part of the northwest quarter of the southeast quarter of said section 32 lying south of the railroad, except certain lots in the town of Maples, was in like manner offered for sale by said sheriff upon the last-mentioned execution, and this defendant bid therefor the sum of $150.00, and,
115 no person bidding more, the same was openly struck off and sold to defendant for that sum, and he now holds said sheriff's certificate therefor.

And on the day last aforesaid, upon the execution last aforesaid, the lots numbered 9, 10, 13, 20, 31, 35, and 36, in the town of Maples; also lots 3, 4, 5, 2, 1, and 6, in the First Addition to said town, were in like manner offered for sale by said sheriff, and this defendant bid therefor the sum of $70.00, and no person bidding more, said

lots were openly struck off and sold to him for that sum, and he now holds the sheriff's certificate therefor.

And on the last day aforesaid all the interest of said Jacob C. Bowser in the west half of the northeast quarter of section 5, township 29 north, of range 14 east, supposed to be 15 acres, was in like manner offered for sale by said sheriff upon an execution issued upon a judgment in the Allen circuit court in favor of the Huron Iron Company against said Jacob C. Bowser and others, ren-
116 dered on the 7th day of April, 1876, for the sum of $256.58 and costs of suit, and this defendant bid therefor the sum of $50.00, and, no person bidding more, the same was openly struck off and sold to him for that sum, and he now holds the sheriff's certificate therefor; and on the day last aforesaid, upon the execution last aforesaid, the east half of the southeast quarter of section 32, township 30, range 14, containing 30 acres, was in like manner offered for sale by said sheriff on the execution last aforesaid, and the defendant bid therefor the sum of $100.00, and, no person bidding more, the same was openly struck off and sold to him for that sum, and he now holds said sheriff's certificate therefor.

And said defendant, answering further, says that prior to the 14th day of June, 1876, said Jacob C. Bowser, Joseph R. Prentiss, and Daniel M. Falls were the owners of lots 17 and 18, in the original plat of the city of Fort Wayne, and lots 565, 566, and 567,
117 in Hanna's Addition to said city, with the foundry, shops, fixtures, engines, machinery, tools, patterns, and personal property appertaining to the business of said J. C. Bowser & Co., the said Bowser being the owner of one-half thereof and said Prentiss and Falls being the owners of the other half thereof, and the same being the partnership property of said J. C. Bowser & Co.; that said property was incumbered by divers judgment liens and by the following mortgages, viz:

A mortgage executed by said Prentiss and Falls to M. E. Woodward to secure $8,000.00, dated April 23, 1869, upon which there remained unpaid about $2,800.00.

A mortgage executed by all said partners to Annie C. Ketcham to secure $4,000.00, dated December 7, 1870.

A mortgage executed by all said partners to Caroline Nuttman to secure $4,000.00, dated January 27, 1874.

A mortgage executed by all said partners to Joseph D. Nuttman to secure $10,000.00, dated May 18, 1874, which last-men-
118 tioned mortgage embraced not only the lots aforesaid, but also the personal property thereon and appertaining to said partnership business.

And that on said 14th day of June, 1876, said Bowser sold and conveyed all his interest in said lots and personal property to Neil McLachlan and Charles L. Olds, who, in part payment therefor, agreed to assume and pay $8,000.00 of said liens, and executed to said Bowser their notes for $14,000.00, in seven installments of $2,000.00 each, which are the same notes which were deposited in the Fort Wayne National Bank as collateral, as hereinbefore stated.

And said defendant, answering further, says that last-named

mortgage was afterward foreclosed in the Allen circuit court by decree dated December 30, 1876, for 8,763.00, on which decree all said lots were sold to this defendant by the sheriff of said county on the 28th day of April, 1877, for the sum of $5,000.00, and
119 the personal property in said mortgage described for $5,804.06, and, no person having redeemed said lots from said sale, the same were, on the 3d day of May, 1878, duly conveyed by said sheriff to this defendant subject to the remaining three mortgages above mentioned and other unsatisfied liens.

And said defendant, answering further, says that at the time of said conveyance to him last mentioned the said McLachland and Olds were in possession under their said purchase from said Bowser; that they were willing to perform with this defendant so much of their contract with said Bowser as yet remains unperformed—that is to say, assume and pay $8,000.00 of the said encumbrances and pay the remaining $12,000.00 of their notes aforesaid, one note of $2,000 having been paid, if this defendant would convey to them the undivided half of the property so purchased by him, and were
120 willing also, in such case, to lease from this defendant the other undivided half of said property; that it was greatly to this defendant's interest to make said sale and lease; that by his purchase aforesaid he had necessarily destroyed the value of the said notes of McLachlan and Olds in the hands of the bank as aforesaid; that said McLachlan and Olds were not willing to give any other notes in the place of them without the surrender of the old notes; that it was out of the power of this defendant to surrender said old notes without the consent of said Bowser, by whom they had been deposited as aforesaid; that it was then clearly apparent that nothing could ever be realized by foreclosure of either of the mortgages held by this defendant, and that the only possibility of his deriving any advantage whatever from the purchases made by him as aforesaid lay in the profitable disposition of the property so purchased, and that it was, in view of all said facts and circumstances, agreed by this defendant with said McLachlan and Olds, with the consent of said Bowser and said bank, that this
121 defendant should convey to said McLachlan and Olds the undivided half of said lots and personal property and take from them an agreement to assume and pay $8,000.00 of said mortgage incumbrances, being the mortgages to Annie C. Ketcham and Caroline Nuttman aforesaid, and execute to this defendant their notes for $12,000.00, which should be deposited in said bank in the place and stead of said notes given by them to said Bowser, said new notes when paid to be credited on the indebtedness of J. C. Bowser & Co. to this defendant in like manner as would have been done if said original notes had been paid, and that said McLachlan should, as part of the same transaction, lease from this defendant the other undivided half of said property; all of which was done accordingly, and which notes of McLachlan and Olds, except $2,000.00 thereof which has been paid, are still in the hands of said bank under said agreement.

And said defendant, answering further, says that he has
122 never foreclosed either of the mortgages executed to him as aforesaid; that the property described in them has all been sold and exhausted in the satisfaction of liens prior thereto, as aforesaid, except the parcel last described in said mortgage, which is of little value and to which said Bowser had only a tax title, and that, to protect the title as purchased by him, he has purchased and now holds entirely unpaid and unsatisfied said judgment in favor of the First National Bank of Cambridge City against said Bowser and others for the sum of $1,452.39 and other judgments, and that he has never received anything whatever out of said mortgage and collateral security except the sum of $3,612.97, which has been paid on said notes of McLachlan and Olds.

And said defendant, further answering, says that all said lands sold to him as aforesaid are situated in the county of Allen and State of Indiana, and, as he is informed and believes, were all regularly advertised for sale, at the court-house door, in said
123 county, as required by law, by virtue and authority of proper and legal executions or orders of sale duly issued on valid judgments taken as aforesaid, and that the same were all regularly sold by such sheriff at the place and time when so advertised, and that the same were each and all fairly; honestly, and legally bid in and bought by this defendant as aforesaid, and that the same are all the lands of said Jacob C. Bowser which have been purchased by this defendant or in which he claims any interest, to the best of his present knowledge, recollection, and belief.

And said defendant, answering further, says that the said mortgage executed to him by said Jacob C. Bowser, as aforesaid, was executed in good faith to secure an actual indebtedness and liability hereinbefore specifically and truly stated, and for no other purpose; that all the purchases of real estate of said Bowser made by him as aforesaid were made in good faith and for the purpose of protecting his own interests as endorser and mortgagor and for no other
124 purpose; and he expressly denies that there is or ever was any understanding or agreement of any kind between him and said Jacob C. Bowser or any one in his behalf that the said Jacob C. Bowser or any one for him should or shall ever receive any interest in or benefit whatever from the purchases of said real estate made by this defendant as aforesaid or any of them; on the contrary whereof he expressly avers that all the lands purchased by him as aforesaid are owned and held by him absolutely and for his own use, and that there is no existing trust, understanding, or agreement of any kind by which said Jacob C. Bowser or any member of his family or any one else is to have any interest in or benefit therefrom, directly or indirectly, in any contingency whatever, unless the agreement aforesaid that the notes of said McLachlan and Olds shall be credited when paid on the liability of J. C. Bowser & Co. to the defendant shall be deemed such an interest.

And this defendant denies all and all manner of unlawful
125 combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter,

cause, or thing in the said complainant's bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in that behalf most wrongfully sustained.

And this defendant, answering the several interrogatories appended to said complainant's bill of complaint, answers and says as follows, to wit:

For answer to the first interrogatory he says that said levy was, as he believes, abandoned, but for what purpose he does not
126 know further than as matter of opinion based on the facts hereinbefore set out.

For answer to the second interrogatory he says that he never had any conversation with said Stearns *et al.* or either of them about said execution or judgment or sale, within his present recollection; that he saw their attorney at or about the time of the first offer of lots 116 and 117 and not afterwards, so far as he can now remember; that he has no recollection of making any statement to any one on the subject, but inasmuch as it is a fact that he was desirous that the judgments ahead of his mortgage should be satisfied as speedily as possible, and did in fact say to all persons who approached him on the subject that he would bid on any property offered on any judgment prior to his mortgage such sums as the value of the property would, in his opinion, justify, it may be that he made that statement to the attorney of said Stearns *et al.* or to said Munson without now being able to recall the fact.

127 For answer to the third interrogatory he says that said lots 116 and 117 were not, in his opinion, worth enough to pay said judgment and the prior specific liens then resting on them, as hereinbefore set out. As to what their actual value was and is he has no certain knowledge, and could only express an opinion which might be widely erroneous.

For answer to the fourth interrogatory he says that he did not have or exercise any control over the levy of said execution and cannot state the motives or purposes of those who had; that his purpose in bidding on the property was to procure satisfaction of the liens prior to his own.

For answer to the fifth interrogatory he says that he had no purpose in the transaction recited except to bid on the property offered for the purpose of getting the Stearns judgment out of the way of his subsequent lien on the property of Bowser and no intent
128 or expectation of cutting off the lien of the plaintiff's mortgage.

For answer to the sixth interrogatory he says that he knew of the plaintiff's said mortgage, and he knew substantially the property owned by said Bowser and the liens upon it, from which facts he could and would have inferred, if it had been incumbent on him to

answer the question, that the best and probably the only way for the plaintiff to make said mortgage debt was by foreclosure of his said mortgage; but he does not remember that, as matter of fact, he canvassed the subject at all or formed any conclusion or opinion upon it.

For answer to the seventh interrogotory he says that he did not cause said *vendi.* to be returned or levy to be set aside; that at the time those things were done he knew enough of the business condition and affairs of said Bowser to believe, if he had been called upon, as he was not, to form any belief on the subject, that
129 said mortgage debt could not be collected by law otherwise than by foreclosure of said mortgage.

For answer to the eighth interrogatory he says that he does not believe that said mortgaged property was worth the whole of said mortgage debt and three or four times the amount of said judgment and what this defendant purchased it for at sheriff's sale. As to what said mortgaged premises were then worth said defendant has no certain knowledge and could only express an opinion which might be widely erroneous.

For answer to the ninth interrogatory he says that all the facts within his knowledge on that subject are stated in his answer to the second interrogatory.

For answer to the tenth interrogatory he says that he does not know.

For answer to the eleventh, twelvth, thirteenth, and fourteenth interrogatories he says that the facts are fully stated in the body of his answer herein preceeding.

130 For answer to the fifteenth interrogatory he says that he believes that Jacob C. Bowser holds the legal title to said lots 116 and 117, subject to a sheriff's certificate of sale held by this defendant, as hereinbefore fully set out; that the same are occupied by said Bowser, and that he pays no rent to any one.

For answer to the sixteenth interrogatory he says that the facts are fully set out in the body of his answer hereinbefore; and, further, that there is not and never has been at any time any understanding or agreement of any kind between himself and said Bowser by which said Bowser or any member of his family or any one for him or them or any of them was or is to have any interest, use, or benefit of any kind in or from any of the property so purchased by him in any manner whatever, unless the agreement that the proceeds of the notes of McLachlan and Olds shall be applied when paid to
131 the indebtedness of J. C. Bowser & Co. shall be deemed such an interest, in reference to which the facts are fully stated in the body of the answer preceeding.

For answer to the seventeenth interrogatory this defendant says that nothing was ever said between him and said Bowser on the subject named.

For answer to the eighteenth interrogatory he says that the facts are fully stated in the body of his answer preceeding.

For answer to the nineteenth interrogatory he says that he had no expectation that the plaintiff would remain ignorant of said

sheriff's sale under the Stearns judgment or fail to redeem therefrom. On the contrary, he expected, so far as he had any expectation on the subject, that he would redeem; that, so far as he is able now to remember, he took no advice from counsel in relation to his said purchase until after the expiration of one year from the date thereof; that said lands not having been redeemed he took
132 the advice of counsel as to the validity of his title under said purchase; that the counsel who appeared for him in the plaintiff's said foreclosure suit were acting under general authority to appear in any matter in court that appeared to affect this defendant's interest; that, upon learning the nature of said suit and that it was for the foreclosure of a mortgage prior to his mortgage, this defendant directed his said attorneys to withdraw their appearance for him in said cause, which they did accordingly.

For answer to the twentieth interrogatory he says that he has no certain knowledge of the value of said premises at either of the times named and could only express an opinion on the subject which might be widely erroneous.

For answer to the twenty-first interrogatory he says that all rents of said lands since they came into his possession have been directly expended on the land, except some share of the crops grown
133 during the last two seasons, of which defendant is not now able to state the value, but that it is much less than the amount expended by him in the permanent improvement of said property by digging well, ditching, fencing, and clearing.

DISTRICT OF INDIANA, *County of Allen:*

John H. Bass, the said defendant, being duly sworn, on his oath says that he has read the foregoing answer and knows the contents thereof; that the matters and things therein stated as of his own knowledge are true, and the matters and things therein stated as upon information and belief he verily believes to be true.

J. H. BASS.

Subscribed and sworn to before me this 30th day of May, 1884.

C. H. WORDEN,
Notary Public.

134 EXHIBIT "A" TO ANSWER OF JOHN H. BASS.

This indenture, made this sixth day of November, 1876, witnesseth: That I, Jacob C. Bowser, of Allen county, in the State of Indiana, mortgage and warrant to John H. Bass, of the same county and State, the following real estate, situated in said county and State (excepting, however, from the operation of the covenant of warranty herein contained a mortgage heretofore executed by me to Frederick Hartmeyer, for the sum of $5,000.00, on lots one hundred sixteen and one hundred and seventeen on the original plat of the town of Fort Wayne, and a mortgage executed by me to David Smith on or about the 1st day of June, 1875, for the sum of $4,750.00 or thereabouts, on the lands hereinafter described as being in Adams town-

ship, in said county of Allen, and excepting in like manner from the operation of such warranty all liens, by judgment or otherwise, heretofore obtained upon any of the property hereinafter mentioned and described), to wit:

Lot numbered one hundred and sixteen (116) and one hun-
135 dred and seventeen (117) of the original plat of the town of Fort Wayne, Allen county, State of Indiana; undivided one-half interest in the east half of the southwest quarter, section sixteen (16), town. thirty (30), range — (15) east, in Jackson township, Allen county, containing eighty acres, more or less; west part of the north half of southwest quarter of section six (6), town. thirty (30), range fifteen (15) east, in Jackson township, Allen county, Indiana, containing sixty (60) acres, more or less; south half of section twenty-seven (27), town. thirty-one (31), range thirteen (13) east, in St. Joseph township, Allen county, Indiana, containing three hundred twenty (320) acres, more or less; north part and west part of northwest quarter of section thirty-four (34), town. thirty-one (31), range thirteen (13) east, in St. Joseph township, Allen county, Indiana, containing one hundred thirteen $\frac{91}{100}$ (113.91) acres, more or less; south half of the southwest quarter of section thirty (30), town.
thirty-one (31), range fifteen (15) east, in Maumee township,
136 Allen county, Indiana, containing eighty (80) acres, more or less; south half of the south half of the southwest quarter of section eight (8), town. thirty (30), range thirteen (13) east, Adams township, Allen county, Indiana, containing forty (40) acres, more or less; the north part of west half of the northwest quarter, north of the Pittsburgh, Fort Wayne and Chicago R. R., in section seventeen (17), town. thirty (30), range — (13) east, in Adams township, Allen county, Indiana, containing twenty-two and $\frac{5}{100}$ (22.5) acres, more or less; the east part of the northwest quarter of section seventeen (17), town. thirty (30), range thirteen (13) east, in Adams township, Allen county, Indiana, containing sixty-eight and $\frac{85}{100}$ (68.85) acres, more or less; the undivided interest in the south half of the south half of the northeast quarter of section thirty-two (32), township thirty (30), range fourteen (14) east, in Jefferson township, Allen county, Indiana, containing thirty-four (34) acres, more or less; the undivided interest in part of the west half of the southeast quarter of section
thirty-two (32), town. thirty (30), range fourteen (14) east,
137 north of the Pittsburgh, Ft. Wayne and Chicago R. R., in Jefferson township, Allen county, Indiana, containing seventy-seven and $\frac{81}{100}$ (77.81) acres, more or less; the undivided interest in the southwest quarter of section thirty-two (32), town. thirty (30), range fourteen (14) east, in Jefferson township, Allen county, *Allen county*, Indiana, containing one hundred and fifty-eight and $\frac{45}{100}$ acres, more or less; the undivided interest in part of the southwest quarter of the southeast quarter of section thirty-two (32), town. thirty (30), range fourteen (14) east, in Jefferson township, Allen county, Indiana, containing thirty-eight and $\frac{85}{100}$ acres, more or less; the southeast quarter of the southeast quarter of section thirty-four (34), town. twenty-nine (29), range fifteen (15) east, in Monroe township, Allen county, Indiana, containing forty (40) acres, more or less; part of the

undivided one-half of the northeast quarter of section nineteen (19), town. thirty (30), range twelve (12) east, in Wayne township, Allen county, Indiana, containing sixty-nine (69) acres, more or less
138 This mortgage is executed for the purpose and upon the considerations following—that is to say: Whereas the said John H. Bass hath, at the request of the said Jacob C. Bowser, agreed to and with the said Bowser to execute, as his surety and as surety for the firm of J. C. Bowser & Co., sundry promissory notes for the sums and to the parties following of the descriptions following, to wit: One promissory note, dated September 28, 1876, for eleven thousand two hundred dollars, payable ninety days after date to the Fort Wayne National Bank or order, with interest at ten per cent. per annum after maturity and five per cent. for attorneys' fees, without any relief from valuation or appraisement laws; one other promissory note for five hundred nine dollars and sixty-one cents, dated, as in that before described, at Fort Wayne, September 28, 1876, payable sixty days after date to the Fort Wayne National Bank or order, with interest at ten per cent. per annum after maturity and five per cent. for attorneys' fees, without any relief from valuation or appraisement laws; one other promissory note for six thousand eight hundred dollars, dated Fort
139 Wayne, September 28, 1876, payable to the Hamilton Bank or order ninety days after date, with interest at ten per cent. per annum after maturity and five per cent. for attorney fees, without relief from valuation or appraisement laws; one other promissory note for six hundred and seventy-one dollars, dated Ft. Wayne, September 28, 1876, payable sixty days after date to the Hamilton Bank or order, with ten per cent. interest thereon after maturity and five per cent. for attorney fees, without any relief from valuation or appraisement laws; one other promissory note for three thousand dollars, payable ninety days after date, dated Fort Wayne, September 28, 1876, with ten per cent. interest after maturity and attorney fees, in favor of John M. Miller, negotiable and payable at the First National Bank, Fort Wayne, Indiana, without relief
140 from valuation or appraisement laws; all of which before mentioned and described notes are signed by J. C. Bowser and Co., as principals:

Now, this mortgage being given to secure and indemnify the said John H. Bass against all liability and loss or damage arising out of or accruing to him by reason of his becoming such surety upon such notes or any renewals thereof and the execution of him hereafter as such surety of any note or notes given in renewal or extension of the same debts or any of them or any part thereof, if the said J. C. Bowser & Co. shall and will pay all of the notes so by the said Bass executed as surety for them and all renewals thereof or notes executed by him in like manner as surety by way of extension or renewal hereafter of the same indebtedness or of any part thereof and shall save the said J. H. Bass harmless in the
141 premises, then this indenture and everything herein contained shall be and remain utterly void.

Witness my hand and seal this sixth day of November, 1876.

J. C. BOWSER. [SEAL.]

STATE OF INDIANA, } ss:
Allen County, }

Personally came before me, the undersigned, a notary public in and for said county and State, Jacob C. Bowser, and acknowledged the execution by him of the foregoing mortgage for the uses and purposes therein mentioned.

Given under my hand and notarial seal this 6th day of November, 1876.

ROB. J. LOWRY, [NOTARIAL SEAL.]
Notary Public.

Recorded Nov. 7, 1876, at 4 p. m.

JOSEPH MOMMER, J.,
Recorder Allen Co.

EXHIBIT "B" TO ANSWER OF J. H. BASS.

This indenture, made this 28th day of September, 1876, witnesseth: That we, Joseph R. Prentiss and Catherine E. Prentiss,
142 wife of said Joseph R., and Daniel M. Falls and Margaret Falls, *his* wife of the said Daniel M., all of Allen county, in the State of Indiana, mortgage and warrant to John H. Bass, of the same county and State, the following real estate, situate in said county and State, to wit:

The undivided one-half of lots numbered seventeen (17) and eighteen (18), in the original plat of the town of Fort Wayne, and the undivided one-half of lots numbered five hundred and sixty-five (565), five hundred and sixty-six (566), and five hundred and sixty-seven (567), in Hanna's Addition to the said town or city of Fort Wayne aforesaid, together with all and singular the privileges and appurtenances to said lots and parcels of land in anywise appertaining and belonging, and all the fixtures, machinery, implements, tools, and utensils therewith, and with the foundry and machine shops on said premises situate in anywise con-
143 nected, including the engine, boiler, and connections thereof; all the lines and shafting and counter-shafting; all pulleys, hangers, and couplings, lathes, whether for the working of wood or iron, iron planers and iron drill presses, shafting and slatting machines, blowers, fanes, pipes and connections with cup valves and forges; all punches, shears, formers, plate-rollers, hammers, drills, mandrills; all small tools used in or about the foundry and machine shops or works aforesaid; all the patterns therein of every kind and class, including the right to use and manufacture all patented articles whatsoever, and all flasks, core boxes, and plates, it being intended to embrace herein and mortgage hereby and there being embraced herein and mortgaged hereby not only the undivided one-half of the real estate before described and all the appurtenances
144 and fixtures therewith and with the foundry, machine shops, and works now owned and operated by the firm of Prentiss and McLachlan & Co., but also the undivided one-half of all personal

property in the way of machinery, tools, implements, motors and utensils, patterns, and all other articles of every kind and description whatsoever used in and about the foundry, machine-shops, and works aforesaid. This mortgage is executed for the purposes and upon the conditions following—that is to say: Whereas the said John H. Bass hath, at the request of the said Joseph R. Prentiss and Daniel M. Falls, agreed to and with the said Prentiss and Falls to execute, as their surety and as surety of the late firm of J. C. Bowser & Co., sundry promissory notes, and does and has simultaneously with the execution of these presents executed with said firm or late firm of J. C. Bowser & Co., as such surety, such sundry promissory notes for the sums and to the parties following and said notes
145 being of the description following, to wit: One promissory note, dated September 28, 1876, for eleven thousand two hundred dollars, payable ninety days after date to the Fort Wayne National Bank or order, with interest at 10 per cent. per annum after maturity and five per cent. for attorney fees, without any relief from valuation or appraisement laws.

One other promissory note for five hundred and nine dollars and sixty-one cents, dated, as is that before described, at Fort Wayne, September 28, 1876, payable sixty days after date to the Fort Wayne National Bank or order, with interest at ten per cent. per annum after maturity and five per cent. for attorney fees, without any relief from valuation or appraisement laws.

One other promissory note for six thousand eight hundred dollars, dated Fort Wayne, September 28, 1876, payable to the Hamilton Bank or order ninety days after date, with interest at ten
146 per cent. per annum after maturity and five per cent. for attorney fees.

One other note for six hundred and seventy-one dollars, dated Fort Wayne, September 28, 1876, payable sixty days after date to the Hamilton Bank or order, with ten per cent. interest thereon after maturity and five per cent. for attorney fees, without any relief from valuation or appraisement laws.

One other promissory note for three thousand dollars, payable ninety days after date, dated Fort Wayne, September 28, 1876, with ten per cent. interest after maturity and attorney fees, in favor of John M. Miller, negotiable and payable at the First National Bank Ft. Wayne, Indiana, without relief from valuation or appraisement laws.

All of which before mentioned and described notes are signed by J. C. Bowser & Co., as principals: Now, this mortgage being given to secure and indemnify the said John H. Bass against all liability and loss or damage arising out of or accruing to him by rea-
147 son of his becoming such surety upon such notes or any renewals thereof and the execution by him hereafter as such surety of any note or notes given in renewal and extension of the same debts or any of them or any part thereof, if the said J. C. Bowser and Co. shall and will pay all of the notes so by the said Bass executed as surety for them and all renewals thereof or notes executed by him in like manner as surety by way of extension or re-

newal hereafter of the same indebtedness or of any part thereof and shall save the said John H. Bass harmless in the premises, then this indenture and everything herein contained shall be and remain entirely void.

Witness our hands and seals this — day of September, 1876.

J. R. PRENTISS. [SEAL.]
CATHERINE E. PRENTISS. [SEAL.]
D. M. FALLS. [SEAL.]
MARGARET FALLS. [SEAL.]

STATE OF INDIANA, } ss:
Allen County, }

148 Before me, the undersigned, a notary public within and for the county and State of Indiana, personally came Joseph R. Prentiss and Catherine E. Prentiss, his wife, and Daniel M. Falls and Margaret Falls, his wife, this 4th day of November, 1876, and acknowledged the execution by them of the foregoing mortgage as their act and deed.

Given under my hand and notarial seal this 4th day of November, 1876.

WILLIS M. DRIVER, [NOTARIAL SEAL.]
Notary Public.

Recorded Nov. 4, 1876, at 4¼ p. m.

JOSEPH MOMMER, JR.,
Rec. A. Co.

And now comes the defendant, Moses Oppenheimer, by R. S. Taylor and Coombs, Bell and Morris, his solicitors, and files herein his separate answer to said amended bill of complaint in these words:

149 This defendant, for answer to complainant's said bill of complaint or to so much thereof as he is advised that it is material or necessary for him to make answer unto, answering, says that he was a member of the late firm of H. E. and C. F. Stearns & Co. and the surviving partner, the said Herman E. Stearns and Charles F. Stearns having died since the sale of the land conveyed by the said complainant's mortgage.

This respondant, further answering, says that he admits the rendition of the judgment in favor of his said firm against the said Reuben Gardner, Andrew C. Gardner, and Henry Blish, and that the several payments thereon were made by said principal debtors, as charged in said complainant's said bill of complaint. He further admits that in consideration of the payment of the interest on said judgment in advance from the 20th day of July, 1876, up to the first day of January, 1877, the said judgment creditors did agree that no execution should be issued on said judgment, before said

150 first day of January, 1877, as charged in said bill of complaint, but he denies that said Bowser, Prentiss, and Falls were thereby released from said judgment, as the same was done at the request and written consent and agreement of the said

J. C. Bowser & Co., a copy of which is filed herewith, marked Exhibit "A," and made a part of this answer.

This respondant, further answering, says that he denies having ever entered into any combination, conspiracy, or agreement with the said Bowser, Bass, and Munson or either of them or with any other person, as charged in said bill of complaint, he having no personal knowledge of the issue or return of said several writs of execution or writs of *venditioni exponas*, the same having been under the exclusive charge and direction of John L. Farrar, the attorney of his firm, the said judgment plaintiffs; but he is informed and believes and therefore admits that an execution was issued upon said Stearns' judgment and levied on said lots 116 and 117, and
151 that said lots were twice offered for sale thereon, but not sold for want of bidders, and said execution was returned, as in said bill of complaint aforesaid. He also admits that an execution was issued to Miami county and returned *nulla bona*, and that a *venditioni exponas* was afterwards issued and said lots again duly offered for sale thereon, but not sold for the want of bidders, and said *vendi.* returned, as charged in said bill of complaint. He also admits that a second *vendi.* was issued thereon and returned, as charged in said bill of complaint; but this respondant denies having had at the time said execution was so issued and returned any knowledge of the existence of the mortgage so assigned to said Milmine or the pendency of any suit to foreclose the same; he also denies — or either of his said partners or their attorney or said Bass correspondtogether with the said Charles A. Munson or had any agreement amongst themselves that said *vendi.* should be returned with the
152 endorsement thereon, as charged in said bill of complaint; but, upon information and belief, he charges the truth to be that said several executions and said first *vendi.* were all issued and returned by order of the said John L. Farrar, and that after the said second *vendi.* was issued the said Farrar, who resided in Peru, Miami county, Indiana, came to Fort Wayne, and, finding that said lots 116 and 117 had been three times offered for sale upon said several executions, but could not be sold for the reason that said lots were encumbered by a previous large mortgage, thought it would be useless to again offer the same for sale, and believing that said Bowser was the owner of the south half of the south — of the southwest quarter of section 8, in township 30 north, of range 13, and the east half of the northwest quarter of section 17, in the same township and range, except two acres in the northeast corner
153 thereof and the right of way of the Ohio and Indiana railroad, and also believing that there were no liens thereon prior to the said Stearns' judgment, and also being informed that said land would probably sell for enough to satisfy said judgment, he ordered said second *vendi.* to be returned and an *alias* execution to be issued on said judgment and levied on the above-described land without any consultation, agreement, or understanding with said Bass, Bowser, or Munson, further than the direction to said Munson to return said *vendi.* and levy said execution on said land. This respondant further says that he has no personal knowledge of any of the mat-

ters or things contained in said bill of complaint and not herein admitted or denied, and therefore has no reason to deny the same; and, having no interest in the event or subject-matter of this suit, pray- to be herein discharged with his reasonable costs.

COOMBS, BELL AND MORRIS,
Solicitors for Def'd't.

154 STATE OF INDIANA, } ss:
Allen County, }

I, Moses Oppenheimer, being duly sworn, depose and say that all the several matters and things which are set forth in the foregoing answer as from the information of others I believe to be true, and that all the several other matters and things therein set forth are true in substance and in fact.

MOSES OPPENHEIMER.

Subscribed and sworn to before me this 21st day of October, 1882.
J. E. K. FRANCE,
Notary Public.

EXHIBIT "A" TO ABOVE ANSWER.

Office of Penn Woolen Mills; H. E. and C. F. Stearns & Co., proprietors.

PERU, INDIANA, *April 9th*, 1875.

Messrs. J. C. Bowser & Co.

GENTS: Referring to the conversation had with your Mr. J. C. Bowser, when he was here some time ago, during which he expressed the wish of your house that we should not push the collection
155 of the judgment we hold against you and Messrs. Gardner, Blish & Co. for the present, we would make of you the following inquiry, viz: Should we agree with Messrs. Gardner, Blish & Co. to forbear at present or at any time from ordering out an execution on the judgment rendered in our favor in the circuit court of your county against themselves and your house, said judgment having been rendered on or about the 22nd of January, 1873, and should we, in pursuance of such agreement, receive from them any interest on said judgment in advance of the date when such payment may be made by them, will it meet your approval and will you thus agree that such payment of interest when made by them is also made by and with your full approval and consent as joint judgment defendants? If so, please answer affirmatively on the face or back of this letter.

Respectfully, H. E. AND C. F. STEARNS.

156 Indorsed.

FORT WAYNE, IND., *April* 13, 1875.

We agree to the within proposition as stated.

J. C. BOWSER & CO.

And now comes the defendant, Jacob C. Bowser, by R. S. Taylor and Coombs, Bell and Morris, his solicitors, and files herein his separate answer to said amended bill of complaint in these words:

This defendant, now and at all times hereafter saving and reserving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and insufficiencies in said bill contained, for answer thereto or to so much or such parts thereof as this defendant is advised that it is material or necessary for him to make answer unto, answering, says that he admits the execution of the notes to Smith and the execution of the mortgage by this defendant and wife upon the lands therein described to secure said notes, as
157 charged in said complaint. He also, upon information, admits the death of said Smith, the assignment of said notes and mortgage by his executors to said complainant, the foreclosing of said mortgage, and the sale and conveyance of said mortgaged premises to said complainant, as in said bill alleged. This defendant also believes it to be true that on the 12th day of May, 1873, Herman E. Stearns, Charles F. Stearns, and Moses Oppenheimer recovered a judgment against Reuben Gardner, Andrew C. Gardner, and Henry Blish, as principals, and this defendant, Joseph R. Prentis, and Daniel M. Falls, as surities, for the sum of $—, as alleged in said complaint, and that said principals paid small sums of money thereon and paid interest in advance on said judgment from the 20th of July, 1876, to the first day of January, 1877, and that plaintiffs agreed to delay execution on said judgment for that period, but this defendant says that such delay in issuing execution on
158 said judgment was with his full knowledge and consent.

This defendant, further answering upon information, says that he believes it to be true that the said Stearns *et al.* caused an execution to be issued on said judgment and levied on said lots 116 and 117 and [on] the original plat of the city of Fort Wayne, upon which said lots were twice offered for sale by the sheriff of said court, but not sold for the want of bidders, and said execution was returned wholly unsatisfied, and that a writ of *venditioni exponas* was afterwards issued on said judgment and said lots again offered for sale, but not sold for the want of bidders, for the reason, as he believes, that said lots were then encumbered by a mortgage to Frederick Hochmeyer for the sum of $5,000.00, with a large amount of interest, and tax titles and tax liens to a large amount, amounting in all to $9,000.00 and more.

He further says that he is informed and believes that the
159 attorney of the said Stearns *et al.* ordered the said sheriff to abandon said levy and return said *vendi.*, and caused an *alias* execution to be issued on said judgment and levied upon the lands so mortgaged to said complainant, upon which said land was sold to said Bass, as in said bill alleged; but this defendant denies that he was directed, advised, or had anything to do with the issuing or return of said writs or any of them, or that he directed the same to be levied upon any particular property. He also denies that he ever entered into any combination, conspiracy, or agreement with the

said Bass or his attorneys, the said Stearns *et al.* or their attorneys, or the said Munson, or with any or either of them, for the purpose charged in said complaint, or that he ever attempted to give the said Bass any advantage over the said complainant or to deprive the said complainant of his rights or interest in said lands so mortgaged to him or in any other property of this defendant, or to pre-
160 vent the said complainant from redeeming said lands or any other lands from sale on execution.

This defendant further says that at the time of the rendition of the said Stearns judgment, to the best of his knowledge and belief, he did not own the said lot 1, sub. N. ½ Hanna's O. La., sec. 2, 30, 12, $\frac{8}{10}$ acres; the E. ½ N. E. q'r, sec. 33, T. —, R. —, 37 acres; the S. E. ¼ S. E. ¼ sec. 11. 31, 13, 39.56 acres; the N. W. ¼ sec. 31, 15, 13, 160 acres; the S. E. ¼ S. E. ¼ sec. 34, 31, 13, 40 acres; the S. ¼ S. W. ¼ sec. 30, 31, 13, 80 acres; the N. W. cor. N. E. ¼ N. W. ¼ sec. 9, 31. 12, 7 acres; the N. W. ¼ S. E. ¼ sec. 36, 31, 13, 40 acres; W. end N, ½ S. W. ¼ sec. 6, 31, 13, 60 acres; the S. ½ N. E. ¼, 18, 3, 15, 80 acres, nor lots 568, in Hanna's Addition to Fort Wayne, or any part thereof, nor had he to his knowledge owned any *any* of said land since that time, but he believes that he did at that time own all the other land and lots described in said bill, but that the same were then incumbered by mortgages, judgments, and delinquent taxes, in adddition to the judgment mentioned in said bill, amount-
161 ing to more than ten thousand dollars, and by judgments rendered against him during the years of 1875 and 1876, amounting to $6,984.78.

This defendant, answering further, says that at the time of the rendition of said judgment in favor of Stearns *et al.* he was the owner of the undivided half of lots 16 and 17 on the original plat of the city of Fort Wayne, and lots 565, 566, and 567, with a foundry, machine shop, and other buildings thereon, in Hanna's Addition to said city, and Joseph R. Prentis and Daniel M. Falls were the owners of the other half, they and this defendant having been doing business thereon under the firm name of J. C. Bowser and Co.; that said property was encumbered by mortgages executed by said J. C. Bowser & Co. as follows:

To Annie C. Kilcham, dated December 7th, for $4,000.00; to Catherine Nuttman, dated January 24th, 1874, for $4,000.00; to Joseph D. Nuttman on all of said lots, together with the personal property
162 thereon and pertaining thereto, dated May 18th, 1874, for $10,000.00; said property was also encumbered by a mortgage executed by said Prentis and Falls to M. E. Woodward, dated May 18th, 1874, to secure $8,000.00; that on the 14th day of June, 1876, this defendant sold his interest in all of said foundary property to Neil McLachlin and Charles L. Olds, who, in part payment therefor, agreed to pay $8,000.00 of said mortgage liens, and executed their notes to this defendant for the sum of $14,000.00, in seven annual installments of $2,000.00 each; they also paid this defendant $1,000.00 cash and a note for $2,000.00, at 60 days, which was paid to this defendant. This defendant, answering further, says that on the 8th day of November, 1876, the said John H. Bass was the en-

dorser for the said J. C. Bowser and Co. on sundry notes, amounting in all to the sum of about $22,000.00, particularly described in the mortgage of this defendant to the said John H. Bass, herein-
163 after referred to. When he, the said Bass, demanded the same, as security to indemnify him against his liability as such endorser, and the said Prentis and Falls being insolvent and unable to give such security, this defendant executed a mortgage to the said Bass on all his said real estate, particularly described in said mortgage, to indemnify him against said liability, this defendant believing at the time that he would be able to remove this judgment and other liens upon said real estate so as to make said mortgage an available security to the said Bass, a copy of which mortgage is filed herewith, marked Exhibit "A;" and this defendant also deposited with the Fort Wayne National Bank the said several notes of the said McLachlin and Olds, amounting to the sum of $14,000.00, as collateral security for the payment of the notes so endorsed by the said Bass.

This defendant, further answering, says that after the exe-
164 cution of said mortgage to the said Bass he found his affairs in such a condition that it was impossible for him to pay off and discharge the liens upon his real estate, as the same were pressed by his creditors, and was compelled to suffer his property to be sold on execution and decrees of foreclosure, as the same was from time to time offered for sale by the sheriff, until all of his real estate was so sold by the sheriff, the most of which, as he is informed and believes, was purchased by the said John H. Bass at such sheriff's sale; all of which sales were made on judgments and mortgage liens prior to the mortgage so executed by this defendant to the said Bass and leaving, as he is informed and believes, prior judgments to a large amount still unsatisfied.

This defendant, further answering, says that he is informed and believes that Joseph D. Nuttman, on the 30th day of December, 1876, obtained a decree in the Allen circuit foreclosing his $10,000.00 mortgage on said foundary lots and the personal property
165 thereon, on which decree all of said lots and the personal property were offered for sale by the sheriff of said county on the 28th day of April, 1877, and the said John H. Bass bid for said lots the sum of $5,000.00, and for said personal property the sum of $5,804.00, and, no person bidding more, the same was openly struck off and sold to him for said sums, and said lots not having been redeemed they were conveyed to the said John H. Bass by said sheriff, which sale was made subject to the prior mortgages aforesaid, and, as this defendant is informed, rendered said seven notes of the said McLachlin and Olds uncollectable for the failure of the consideration therefor; but this defendant is further informed and believes that the said Bass made an arrangement with the said McLachlin and Olds by which they retained a half interest in said foundary property, in consideration of which they agreed to pay six of said two-thousand-dollar notes so left in said bank, one of said
166 notes having been paid before said sale to said Bass or the conveyance of said property to him. This defendant, further

answering, says that he cannot answer as to the value of the property so owned by him, but as the same was all openly sold on execution to the highest bidder and none of said sales were redeemed by said complainant or any other of his creditors he supposes that the prices for which said property was sold was the value of said property.

And this defendant denies that he ever did any act or in any manner assisted the said Bass or entered into any arrangement with him or any other person to prevent his land so sold on execution from selling at its full value, and if any of said property was sold for less than its value it was not by the fault or procurement of this defendant.

And this defendant, further answering, expressly denies that he has any interest whatever in the property so purchased by
167 said John H. Bass at sheriff's sales as aforesaid, or that he ever had any agreement or understanding with said Bass by which this defendant was to have any interest whatever in said property or any part thereof, or that he was in any manner to derive any benefit or advantage therefrom, or that he ever expected to derive any benefit therefrom; and this defendant denies all and all manner of fraud or unlawful combination and confederacy whatever he is by said bill charged, without this, that there is any other matter or thing in said complainant's said bill of complaint contained material or necessary for this defendant to answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready to verify, maintain, and prove as this honorable court shall direct, and he humbly prays to be hence discharged with his rea-
168 sonable costs and charges in this behalf most wrongfully sustained.

And this defendant, answering the several interrogatories appended to said complainant's bill of complaint, for answer to interrogatory No. 1 says that he had nothing to do, directly or indirectly, in relation to setting aside the levy of the Stearns *et al.* execution on lots 116 and 117, or the issue and levy of an *alias* execution on said judgment, and cannot answer as to the motions [motives] of those causing it to be done.

And for answer to No. 2 he says that he has no knowledge of any of the matters herein contained.

And for answer to No. 3 he says he has no means of knowing the precise cash value of lots 116 and 117, but as said lots were encumbered by a mortgage and other specific liens superior to the lien of the said Stearns *et al.* judgment, amounting to near $10,000.00, and as the same were three times publicly offered for sale on said Stearns *et al.* executions, he believes the same could not have been
169 sold for more than the specific liens thereon. He further says that he believes the sum paid therefor by the said Bass, to wit, the sum of $10,804.00, was its full cash value, but if not said sale is still open for redemption.

And for answer to No. 4 and No. 5 he says he had no such motive.

And for answer to No. 6 he says *he says* he knows of no other

means for said complainant to collect his said debt than by his said mortgage, unless by the redemption of lands of this defendant sold on execution.

And for answer to No. 7 he says he did not cause said *vendi.* and levy to be set aside.

And for answer to No. 8 he says he did not know said mortgaged premises were worth three times the amount of said complainant's mortgage and the amount for which it was sold to said Bass, and does not believe it was worth anything like that amount.
170 He further says he has no means of knowing the precise value of said land, but believes it was worth much more than the sum bid therefor by said Bass.

And for answer to No. 9 he says he has no knowledge of any such agreement.

And for answer to No. 10 he says the only knowledge he has of the particulars of the several payments alleged to have been made on the said Stearns *et al.* judgment is from the statements in complainant's bill, but he believes execution was delayed on said judgment as charged in said bill, but it was done with his full knowledge and consent.

And for answer to No. 11 he says that said Bass did hold a mortgage on all or nearly all of the real estate of this defendant, the date of which, the description of the lands mortgaged, and the consideration therefor or the notes to be secured thereby are fully set
171 forth in Exhibit "A" to this answer to said bill of complaint.

And for answer to No. 12 he says that said mortgage was not given to secure any other debt, claim, or liability than as therein stated.

And for answer to No. 13 he says he does not know that any of the money said Bass has been compelled to pay has been paid back to him, but is informed that one of the $2,000 notes of McLachlin and Olds has been paid, but how the money was applied he does not know. He further says he believes the whole amount paid by him as such endorser is still due him, unless payments have been made to him out of moneys received on said notes of McLachlin and Olds, and that he knows of no security which said Bass has therefor other than said collateral notes.

And for answer to No. 14 this defendant says that he has conveyed none of his property to said Bass since the execution of said mortgage to him; that, so far as he knows or believes, the follow-
172 ing is a correct list of all the property of this defendant which was purchased by said Bass at sheriff's sales, for which sheriff's deeds have been made, with the date of the several purchases and the sums paid therefor:

September 8, 1877.—The northeast quarter of the S. E. ¼ section 27, township 31, range 13, sold for $350.00.

December 1, 1877.—The S. E. ¼ of the S. E. ¼ sec. 27, 31, 13, sold for $140.00.

January 13, 1877.—Undivided ½ of S. W. ¼ sec. 16, 30, 15, sold for $50.

January 26, 1878.—The W. ½ S. E. ¼ sec. 27, 31, 13, sold for $428.97.

December 23, 1876.—The N. W. fractional ¼ sec. 34, 31, 13, sold for $650.00.

December 23, 1876.—Lot 34, in Bowserville, sold for $200.00.

January 13, 1877.—60 acres off the W. side of N. ½ N. W. ¼ sec. 6, 30, 15, sold for $230.00.

Dec. 23, 1876.—The W. ½ S. W. ¼ sec. 27, 31, 13, sold for $960.00.

January 10, 1880.—The E. ½ S. W. ¼ sec. 27, 31, 13, sold for $1,933.34.

January 10, 1880.—Lot 4, in Bowserville, sold for $200.00.

173 January 10, 1880.—Lot 46, in Bowserville, sold for $233.34.

Jan'y 10, 1880.—Lot 48, in Bowserville, sold for $200.00.

Jan'y 10, 1880.—Lot 45, in Bowserville, sold for $233.34.

August 3, 1878.—The E. ½ N. W. ¼ sec. 17, 30, 13, excepting ten acres in the N. E. corner thereof and the right of way for the railroad, 68.35 acres; also all of the N. part of N. W. ¼ north of the railroad in the W. ½ N. W. ¼ of said section 17, 23.5 acres; also the S. ½ S. E. ¼ sec. 8, 30, 15, being the land mortgaged to said Smith, sold for $2,000.00, and, to the best knowledge and belief of this defendant, the following is a correct list of the property bid in by said Bass at sheriff's sales and still redeemable, with the dates and amounts of each sale, to wit:

March 5, 1882.—Lots 116 and 117, original plat of Fort Wayne, sold for $8,531.07, subject to specific liens amounting to $1,678.17.

February 18, 1882.—The undivided ½ of the E. ½ S. W. ¼, 33, 30, 14, sold for $715.00.

174 September 23, 1882.—This one interest of this defendant is the S. ½ S. E. ¼ sec. 31, 31, 15, 80 acres; the S. E. ¼ S. E. ¼ sec. 34, 29, 15, 40 acres; also the interest of this defendant in the S. ½ of the S. ½ N. E. ¼ sec. 32, 30, 14, supposed to be 12.75 acres; the S. W. ¼ sec. 32, 30, 14, supposed to be 59.60 acres, sold for $410.00.

September 23d, 1882.—The ⅓ of lots 1, 2, 3, 4, 9, 11, 12, 13, 15, 16, 17, and 18, in Second Addition to town of Maples, sold for $60.00.

September 23, 1882.—The interest of this defendant in that part of the W. ½ S. E. ¼ sec. 32, 30, 14, north of the P., Ft. W. and C. railroad, 15 acres; and that part of S. W. ¼ S. E. ¼ sec. 32, 30, 14, south of said railroad, supposed to be 15 acres; and that part of N. W. ¼ S. E. ¼ of said section 32, lying south of said railroad, except lots in Maples, sold for $150.00.

September 23, 1882.—The ⅓ of lots 9, 10, 13, 30, 31, 35, and 36, in the town of Maples, and lots 3, 4, 5, 2, 1, and 6, in the first addition to said town, sold for $70.00.

175 September 23, 1882.—The interest of this defendant in the W. ½ N. E. ¼ section 5, 29, 14, supposed to be 15 acres, sold for $50.00.

September 23, 1882.—This defendant's interest in the E. ½ S. E ¼ sec. 32, 30, 14, supposed to be 30 acres, sold for $100.00.

The foregoing is all the land of this defendant ever purchased by the said Bass to the best of his knowledge and belief, and there was never any understanding that this defendant was to retain any interest therein.

And for answer to No. 15 he says he is informed and believes that

the said John H. Bass now holds a sheriff's certificate for said lots 116 and 117 sold to him, but the time for the redemption has not yet expired and this defendant is still entitled to the possession and still holds possession thereof, which is all the interest he holds in said lots.

And for answer to No. 16 he says there was no secret under-
176 standing or agreement between him and the said Bass by which this defendant was to have any interest in said lands, nor does he expect to have or receive any interest, compensation, or benefit hereafter from any of said property for himself or any member of his family, and that no member of his family has ever received any interest or benefit from any of said property, nor have they any reason to expect any such interest or benefit, to the knowledge or belief of this defendant.

And for answer to No. 17 this defendant says that nothing was ever said between him and the said Bass or any other person in relation to setting aside said levy, and that his consent thereto was never asked by said Bass or any other person.

And for answer to No. 18 he says that said Bass did not get any notice given to Bowser, Prentis, and Falls to the knowledge or belief of this defendant, and that the said Bowser, Prentis, and
177 Falls never sold said foundary property or any interest therein to said McLachlin and Olds, but the one-half thereof was sold to them by this defendant, as heretofore stated in this answer to said bill, but said Bass never had a mortgage on said premises, to the knowledge or belief of this defendant, and said Bass got none of the proceeds of said sale by this defendant to said McLachlin and Olds, to the knowledge or belief of this defendant.

And for answer to No. 19 this defendant says that he was never consulted with or had *any* anything to do with the matters stated in said interrogatory, and had no such expectation. He further says that, finding himself unable to protect his property by the payment of the judgments and other leins thereon and having no control over said judgment or his creditors, he could do nothing but submit to the inevitable and suffer his property to be sold in due course of law, he doing nothing to favor one creditor over others.

178 And for answer to No. 20 this defendant says he does not know the fair cash value of said mortgaged premises at the date of the commencement of this suit or at the present time, but thinks it at the present time ought to be worth $—— per acre.

And for answer to No. 21 this defendant says he has no knowledge of the matters therein stated.

EXHIBIT "A" TO ABOVE ANSWER.

This indenture, made this sixth day of November, 1876, witnesseth: That I, Jacob C. Bowser, of Allen county, in the State of Indiana, mortgage and warrant to John H. Bass, of the said county and State, the following real estate, situate in said county and State (excepting, however, from the operation of the covenant of warranty

herein contained a mortgage heretofore executed by me to Frederick Hartmeyer, for the sum of $5,000.00, on lots one hundred and sixteen and one hundred and seventeen on the original plat of
179 the town of Fort Wayne, and a mortgage executed by me to David Smith on or about the first day of June, 1875, for the sum of $4,750.00, or thereabouts, on the lands hereinafter described as being in Adams township, in said county of Allen, and excepting in like manner from the operation of such warranty all liens, by judgment or otherwise, heretofore obtained upon any of the property hereinafter mentioned and described), to wit:

Lot- numbered one hundred and sixteen (116) and one hundred and seventeen (117), of the original plat of the town of Fort Wayne, Allen county, State of Indiana; undivided one-half interest in the east half of the southwest quarter, section sixteen (16), township thirty (30), range fifteen (15) east, in Jackson township, Allen county, containing eighty (80) acres, more or less; west part of the north half of southwest quarter of section six (6), town. thirty (30),
180 range fifteen (15) east, in Jackson township, Allen county, Indiana, containing sixty (60) acres, more or less; south half of section twenty-seven (27), town. thirty-one (31), range thirteen (13) east, in St. Joseph township, Allen county, Indiana, containing three hundred twenty (320) acres, more or less; north part and west part of northwest quarter of section thirty-four (34), town. thirty-one (31), range thirteen (13) east, in St. Joseph township, Allen county, Indiana, containing one hundred thirteen $\frac{91}{100}$ (113.91) acres, more or less; south half of the southwest quarter of section thirty (30), town. thirty-one (31), range fifteen (15) east, in Maumee township, Allen county, Indiana, containing eighty (80) acres, more or less; south half of the south half of the southwest quarter of section eight (8), town. thirty (30), range thirteen (13) east, Adams township, Allen county, Indiana, containing forty (40) acres, more or less; the north part of the west half of the northwest quarter, north of the Pittsburgh, Fort Wayne and Chicago railroad, in section seventeen (17), town. thirty (30),
181 range thirteen (13) east, in Adams township, Allen county, Indiana, containing twenty-two and $\frac{5}{100}$ (22.05) acres, more or less; the east part of northwest quarter of section seventeen (17), town. thirty (30), range thirteen (13) east, in Adams township, Allen county, Indiana, containing sixty-eight and $\frac{85}{100}$ (68.85) acres, more or less; the undivided interest in the south half of the south half of the northeast quarter of section thirty-two (32), town. thirty (30), range fourteen (14) east, in Jefferson township, Allen county, Indiana, containing thirty-four acres, more or less; the undivided interest in part of the west half of the southeast quarter of section thirty-two (32), town. thirty (30), range fourteen (14) east, north of the Pittsburgh, Fort Wayne and Chicago railroad, in Jefferson township, Allen county, Indiana, containing seventy-seven $\frac{81}{100}$ (77.81) acres, more or less; the undivided interest in the southwest
182 quarter of section thirty-two (32), town. thirty (30), range fourteen (14) east, in Jefferson township, Allen county, Indiana, containing one hundred and fifty-eight $\frac{45}{100}$ (158.45) acres, more

or less; the undivided interest in part of the southwest quarter of the southeast quarter of section thirty-two (32), town. thirty (30), range fourteen (14) east, in Jefferson township, Allen county, Indiana, containing thirty-eight and $\frac{85}{100}$ (38.85) acres, more or less; the southeast quarter of the southeast quarter of section thirty-four (34), town. twenty-nine (29), range fifteen (15) east, in Monroe township, Allen county, Indiana, containing forty (40) acres, more or less; part of the undivided one-half of the northeast quarter of section nineteen (19), town. thirty (30), range twelve (12) east, in Wayne township, Allen county Indiana, containing sixty-nine (69) acres, more or less. This mortgage is executed for the purpose and upon the considerations following—that is to say: Whereas the said John H. Bass hath, at
183 the request of the said Jacob C. Bowser, agreed to and with the said Bowser to execute, as his surity and as surity for the firm of J. C. Bowser and Co., sundry promissory — for the sums and to the parties following of the description following, to wit: One promissory note, dated September 28th, 1876, for eleven thousand and two hundred dollars, payable ninety days after date to the Fort Wayne National Bank or order, with interest at ten per cent. per annum after maturity and five per cent. for attorneys' fees, without any relief from valuation or appraisement laws; one other promissory note for five hundred nine dollars and sixty-one cents, dated, as is that heretofore described, at Fort Wayne, September 28th, 1876, payable sixty days after date to the Fort Wayne National Bank or order, with interest at ten per cent. per annum after maturity and five per cent. for attorneys' fees, without any relief from valuation or appraisement laws; one other promissory note
184 for six thousand eight hundred dollars, dated Fort Wayne, September 28th, 1876, payable to the Hamilton Bank or order ninety days after date, with interest at ten per cent. per annum after maturity and five per cent. for attorneys' fees, without relief from valuation or appraisement laws; one other promissory note for six hundred and seventy-one dollars, dated Fort Wayne, September 28th, 1876, payable sixty days after date to the Hamilton Bank or order, with ten per cent. interest thereon after maturity and five per cent. for attorneys' fees, without any relief from valuation or appraisement laws; one other promissory note for three thousand dollars, payable ninety days after date, dated Fort Wayne, Sept. 28th, 1876, with ten per cent. interest after maturity and attorneys' fees, in favor of John M. Miller, negotiable and payable at the Fort Wayne National Bank, Fort Wayne, Indiana, without relief from valuation or appraisement laws; all of which before men-
185 tioned and described notes are signed by J. C. Bowser & Co., as principals:

Now, this mortgage being given to secure and indemnify the said John H. Bass against all liability and loss or damage arising out of or accruing to him by reason of his becoming such surity upon such notes or any renewals thereof and the execution of him hereafter as such surity of any note or notes given in renewal or extension of the same debts or any of them or any part thereof, if the said J. C. Bowser & Co. shall and will pay all of the notes so by the said

Bass executed as surity for them and all renewals thereof or notes executed by him in like manner as surity by way of extention or renewals hereafter of the same indebtedness or any part thereof and shall save the said J. H. Bass harmless in the premises, then this indenture and every thing herein contained shall be and remain utterly void.

186 Witness my hand and seal this sixth day of November, 1876.

J. C. BOWSER. [SEAL.]

STATE OF INDIANA, } ss:
Allen County, }

Personally came before me, the undersigned, a notary public within and for said county and State, Jacob C. Bowser, and acknowledged the execution by him of the foregoing mortgage for the uses and purposes therein mentioned.

Given under my hand and notarial seal this 6th day of November, 1876.

ROB. J. LOWRY, [NOTARIAL SEAL.]
Notary Public.

Recorded Nov. 7, 1876, at 4 p. m.

JOSEPH MOMMER, JR.,
Recorder Allen Co.

And now again comes the complainant, by Mess. Ninde and Ellison, his solicitors, and files herein his replication to the answer of said Bass in these words:

187 This repliant, saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of said answer, for replication thereto, saith that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatever in said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

GEORGE MILMINE.

L. M. NINDE, *Solicitor.*

And afterwar-s, to wit, at the June term of said court, on the 12th day of September, A. D. 1884, before the Honorable William

188 A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their solicitors, and the court doth now refer this cause to W. P. Fishback, master in chancery, to take the evidence and report the same with his findings thereon to the court with all convenient speed; and the plaintiff, by L. M. Ninde, his

solicitor, moves the court that the plaintiff in this cause be allowed twenty days in which to take testimony, the defendants twenty days thereafter in which to take their testimony, and the plaintiff ten days thereafter to rebut; which motion is sustained by the court.

And afterwards, to wit, in vacation of said court, on the 31st day of October, A. D. 1885, the following further proceedings in the above-entitled cause were had, to wit:

Comes now William P. Fishback, master in chancery, and
189 files herein the evidence and his report of the same in the words following, to wit:

Testimony of Plaintiffs.

Deposition of John L. Farrar.

Q. 1. State your name, occupation, and residence.

A. John L. Farrar; attorney-at-law; Peru, Ind.

Q. 2. Are you the same John L. Farrar who acted as the attorney of H. E. and C. F. Stearns, who recovered a judgment in the Allen circuit court on the 12th day of May, 1875, against Gardner, Blish & Co., of Peru, and J. C. Bowser & Co., of Fort Wayne, Ind., on which certain property belonging to J. C. Bowser was sold Aug. 3, 1878, to the defendant, John H. Bass, it being the sale that it is sought in this case to set aside?

A. I am the same.

Q. 3. State whether or not from the time the judgment was obtained till the sale you were frequently at Fort Wayne attending to the collection of the same.

190 A. I was.

Q. 4. State whether you examined the records of the county at any or all of these times so as to ascertain what property any of the members of the firm of J. C. Bowser & Co. had and as to what encumbrances there were on the same; if so, state when you made such examinations and how thoroughly you did so.

A. I was in the sheriff's office and clerk's office; made some examination in the clerk's office, but depended more particularly for my information in relation to Bowser's matters and financial condition upon a man I found in the sheriff's office, who seemed to be familiar—I might say had full knowledge of Bowser's condition, the mortgages upon his property, and judgments against him, who aided me and gave me such information as I desired. My impressions are that this was after the first levy had been made on Mr. Bowser's property and it had failed to sell.

191 Q. 5. Were not these examinations and this consultation before you levied on the property you sold, and did you not at that time learn of the Smith mortgage on said land, made in 1875?

A. I think quite likely it was before, and that I learned of a mortgage, but it's so long ago I can't remember distinctly about it. I have testified once before in this case and took a good deal of

pains to refresh my memory, and the statements in that deposition are correct.

Q. 6. Did you not in those examinations and by that consultation with the man you speak of learn of the various tracts of lands owned by Mr. Bowser and his partners?

A. I think I did learn of the various tracts.

Q. 7. Did you consult with Mr. W. H. Coombs or Mr. Bell in regard to this matter?

192 A. I did. I talked with Mr. Bell in relation to it; I think I did. I talked with both Bell and Coombs, and I think I asked them to help me find me a purchaser so that I could make the money on the judgment.

Q. 8. How many times did you talk with the man you found in the sheriff's office? How many times with Mess. Coombs and Bell?

A. Three times with the man I found in the sheriff's office; once with Mr. Bell, and I think Mr. Coombs was present.

Q. 9. Was you in Fort Wayne after the levy was made and before the sale?

A. I think I was.

Q. 10. What was said to you by Mr. Coombs or Bell in regard to finding a purchaser?

193 A. I think Mr. Bell said he would be glad to aid me in any way he could, and that he would if he could. I don't remember that Mr. Coombs said anything upon that subject.

Q. 12. What further did Mr. Bell do or say in regard to the sale?

A. I don't know that he did anything. I don't remember that he said anything further.

Q. 13. Do you have any distinct recollection as to when you first learned as to the mortgage made, in 1875, to the Smiths, on the property in controversy, either from an examination of the record or in any other manner?

A. I *o*wnly remember that it was while I was trying to make the money for Messrs. Stearns out of the Bowsers property.

Cross-examined by R. S. TAYLOR, attorney for the defendants:

194 Q. 14. When you first issued execution on your judgment against Bowser & Co. did you direct the sheriff upon what to levy, or did you leave that to his discretion?

A. I think I directed him upon what to levy. Let me think a minute about it. I am inclined to think the sheriff made the first levy with- any direction from any body.

Q. 15. And, if I understand correctly, several attempts were made to sell on that levy without finding any bidder?

A. That is my memory of it.

Q. 16. You may state whether or not you became convinced that it was impossible to make anything on that levy.

A. I did. I did the best I could to make the property sell, but failed.

Q. 17. What directions, if any, did you then give the sheriff in regard to that levy?

A. I finally directed him to abandon that levy.

Q. 18. You may state whether it was after that, and with
195 a view of finding some property that would be more likely to sell, that you made the inquiry at the sheriff's and clerk's offices which you have mentioned.

A. It was for that purpose.

Q. 19. Did you at that time examine the records in the recorder's office?

A. No; I did not, although I knew pretty near the condition of Bowser's property in the recorder's office.

Q. 20. Where had you got that information?

A. I had got that information from the man spoken of above, who I believed to be the deputy sheriff at that time, who seemed to be familiar with Bowser's matters, and after finding upon examination that his statements were true I relied upon his information.

Q. 21. Did you make a thorough personal examination of records in the clerk's office, or did you rely on him to any extent for that?

196 A. We were together, and I relied very much upon his statement. He could turn at once to whatever related to Bowser's property, and he showed me what I asked to know.

Q. 22. How long were you engaged in this investigation?

A. Not more than three-quarters of an hour. I satisfied myself that it would take two or three days to go through the records in regard to Bowser's matters, as they were exceedingly complicated.

Q. 23. Did you acquire such knowledge for yourself of the whole of Bowser's property and all the liens on it and the amount and priority of each as to enable you to judge for yourself what would be the effect of levying on this or that parcel on the interests of junior creditors?

A. I did examine sufficiently to satisfy myself that I could make the money out of that land; nothing more.

197 Q. 24. Did you find or did you know of any unencumbered property belonging to Bowser?

A. I satisfied myself there was no unencumbered property, and I took the only way to make my money.

Q. 25. Did you know at that time of any property of Bowser upon which you had any better right to levy or on which you could levy with less prejudice to others than on the lands which you took?

A. No, sir; I did not; I thought it was my best chance.

Q. 26. I will ask you to recur to my question number 22 and state whether you think it certain that you knew all the titles of Bowser and all the liens on them fully enough to marshall the assets like a chancellor. Is it not a fact that you simply carried your investigations far enough to satisfy yourself that the best thing you
198 could do was to levy on the land you took, and then stopped?

A. I did not understand enough of the assets and encumbrances to undertake to marshall the assets among the creditors. I mean to say I acquired such a knowledge of Bowser's property and its condition as satisfied me I could make the money out of the property on which I levied. I had no such understanding as to enable

me to marshall the assets in Bowser's matters, and that is the way I want to be understood in my answer to question 22.

Q. 27. Was the conversation with Mr. Bell to which you have referred before or after you had levied or directed a levy on the lands which were finally sold?

A. It was before.

Re-examination by pl'ff's att'y:

199 Q. 28. Did anything occur in your conversation with this man to enable you to know that he was as familiar with the property of Bowser as you have stated when you talked with him?

A. Yes; he seemed familiar, and I was satisfied he was familiar.

JOHN L. FARRAR.

The above deposition may be read in the above case without further certificate or authentication.

R. S. TAYLOR,
Att'y for Def'ts.
T. E. ELLISON,
For Pl'ff.

200 The plaintiff called JOHN L. FARRAR, who, after being duly sworn, testified as follows:

Direct examination by Mr. BELL:

Q. 1. Where do you reside?

A. Peru, Miami county, Indiana.

Q. 2. What is your business?

A. I practice law.

Q. 3. I believe you were the attorney for Harmon E. Stearns and Charles F. Stearns and Moses Oppenheimer.

A. Yes, sir; and perhaps there was another. I disremember whether there was at — time or not.

Q. 4. In the suit they brought against Bowser and others in Allen circuit court you procured judgment, I believe, for the parties named in one of the courts of this county against Gardner, Bliss & Co. as principal- and Bowser & Co. as sureties?

A. Yes, sir.

Q. 5. Do you remember about when the first execution was issued on that judgment?

201 A. It was in May—no; in 1873—we took our judgment. It was in 1877 the first execution was issued; perhaps it was in June.

Q. 6. Do you remember on what property that execution was first levied?

A. It was levied upon the property and real estate of lots 116 and 117, I think, in the city of Fort Wayne.

Q. 7. You may state, if you remember, whether or not it was the lots upon which the residence of Mr. Bowser was situated at that time.

A. Yes, sir.

Q. 8. I believe that property wasn't sold on that execution, was it?

A. It was offered for sale and failed to sell for want of bidders.

Q. 9. Do you remember how often it was offered for sale?

A. I think it was three times—perhaps four times. I think it was three, though.

202 Q. 10. What efforts did you make, if any, on behalf of the execution — plaintiffs to obtain a purchaser for the property?

A. Well, I came here at least twice and did all that I could to get a man to bid on that property. I asked different persons, and talked with Mr. Bowser about it, and talked with others about it. I was anxious to sell it and make the collection. I cannot name the persons that I talked to and sought to get the bid from, yet I bid all that I could.

Q. 11. How did you happen to have the execution returned or the levy on that property released?

A. The execution was returned in the first instance because the property failed to sell. It was returned in the second instance, if my memory serves me correctly, for the same reason. In the third writ that was issued—I don't remember just exactly what

203 it was. The execution itself will state the reason—possibly for want of bidders. Then an *alias* execution was issued. My clients were insisting it should be done—that something should be done. I came up here and made some inquiries as to why it was that the property wouldn't sell and made up my mind that it was useless to pursue that any longer, and to make some inquiries about other property that would be likely to sell. A gentleman who was in the sheriff's office, I think, a heavy set man and bald-headed, if my memory is correct, and fair-faced—I was talking with him about it some. He told me he believed there was a piece of land not far from the city of Fort Wayne, and possibly adjoining the corporation, that he believed would sell. I made an examination of it and found that a mortgage had been placed upon it, I think, in

204 1875. Their judgment was a first lien, and I came to the conclusion that the judgment of my clients was the first lien on the land and that it would probably sell, and I caused execution to be levied upon that tract of land, possibly tracts, but I think a tract.

Q. 12. Do you remember whether the gentleman with whom you talked in the sheriff's office was named Platt J. Wise?

A. I don't think I would remember the name.

Q. 13. What arrangement or agreement or conversation did you ever have with John H. Bass or any one representing him or his *his* attorneys with reference to releasing the levy from lots 116 and 117 or making a levy on the other tract of land on which you finally levied before the levy was made?

A. I never talked with Bass upon the subject before that

205 time. I believe I had never talked with him upon the subject of making the collection before that time. I had been up here, and asked you, Mr. Bell, in relation to these matters when you were his attorneys at that time; but after the levy had been made upon the land I looked for Mr. Bass. I was acquainted with

him, and knew he was a man of means. I asked him if he would buy that tract of land when it was offered for sale. He told me he would see his attorneys. He didn't give me any more satisfaction than that at that time.

Q. 14. Did you ever at any time make any arrangement with Mr. Bass or any one representing him or make an agreement by which you were to release the property levied upon first in the execution named and resort to the piece finally sold?

A. I never did.

206 Q. 16. You may state whether there was any arrangement made by you with any person before you did it for the doing of that, or whether you did it on your own account simply to collect your debts.

A. What efforts were made were made by myself under difficulties here, which were continuous, it seemed to me. I did it after exercising a good deal of care and diligence, and solely for the purpose of collecting the debts, without consultation with anybody, I remember now, except this man who advised me in the first instance in relation to this real estate, for which I was at that time very thankful.

Cross-examined by Mr. ELLISON:

Q. 17. Do you recollect, Mr. Farrar, whether you issued or caused the execution to be issued yourself or had some person else to do it?

207 A. I caused them to be issued myself, I think, in every instance. I did, personally. I might be wrong about that. I at one time wrote to Mr. Robert Stratton to have an execution issued. It might be I did that more than once, but I think not.

Q. 18. Mr. Stratton was acting as an attorney for some other persons who held an execution against Mr. Bowser, was he not?

A. He told me at that time he had a judgment later than mine, and his interests were in some respects identical with mine. I remember of his saying that.

Q. 19. Were you and he not acting together and trying to make the collection? Did he not act for you?

A. In the single instance was the only time I remember of when I requested him by letter to have execution issued.

Q. 20. Did you ask for the issuing of the *vendis.* that were

208 issued?

A. I think I did.

Q. 21. Were you here at one time along in July, 1878—about the first of July?

A. I couldn't say about the first of July. I was here quite frequently.

Q. 22. There was a *vendi.* issued or had been issued some time before that and returned on the 5th day of July and a new *vendi.* issued. Was it issued in July and returned on the fifth?

A. I don't know exactly the time. That was done on my order. I think I was here at that time. I think I looked at that matter personally.

Q. 23. Mr. Stratton signed the precipe book?

A. I think he did. Are you speaking now of the levy upon this land?

Q. 24. Yes, sir.

A. The levy upon that land was ordered by myself and
209 was investigated by myself and was done without anybody knowing it save this gentleman I spoke of. I am quite sure Mr. Stratton did not know it. I am quite sure Mr. Stratton knew nothing about that thing until a levy was made.

Q. 25. You had a number of consultations with Mr. Stratton?

A. I had two, I think. I was here one time and talked with him about it and subsequently wrote to him. I may have had two consultations with him in his office. You will see that, while Mr. Stratton and myself were in some respects acting or might act together, in other respects we were not, because mine was a prior judgment, which I wanted to make and did finally make it.

Q. 26. You live at Peru?

A. Yes, sir; Miami county, Indiana.

Q. 27. Do you recollect what was paid on this judgment?

210 A. No, sir; at the time the judgment was paid whatever interest or payment had been made was deducted from the principal, so that we got only what was overdue, and I have not got all that quite.

Q. 28. Do you know anything about that agreement by which it was postponed if the interest was paid?

A. Yes, sir; I do know all about that.

Q. 29. There was some agreement made by which interest was paid from time to time at ten per cent., was there not?

A. There was an arrangement made by which interest was paid a number of times, but each time it was done with the consent of Mr. Bowser & Co.

Q. 30. Was that interest paid in advance or not?

A. Let me think a minute about that. Gardner, Bliss & Co. were anxious to get time on the paper and did several times get
211 an extension, but always with the written consent of Bowser & Co., and also on the judgment, but there was no extension after execution issued, and all the extensions given were with the consent of Bowser and Co., but about the payment of interest I could not state to you definitely. I am inclined to think that interest was paid, whatever was paid, when they could pay it. They were willing as long as Bowser and Bliss were regarded as good; they were willing to extend the time for their accom-odation. They were running a basket factory in the city, and as long as their claim was protected they were willing to give time.

Redirect by Mr. BELL:

Q. 31. Do you remember whether or not the time was extended before you finally issued execution and levy, and levied?

A. O, yes; yes, sir.

212 Recross by Mr. ELLISON:

Q. 32. Mr. Farrar, you may state whether there was not interest paid at several times before 1876, and whether there was not, on the 20th of July, 1876, interest paid up to January 1, 1877, on those Stearns judgments by Gardner, Bliss and Company.

A. My attention has been called to a receipt of H. E. & C. F. Stearns placed on a docket at the court-house for interest from July 20th, 1876, to January 1, 1877, which I suppose to be correct.

Q. 33. They were the plaintiffs themselves?

A. Yes, sir.

Q. 34. Or representing the judgment?

A. Yes, sir; H. E. and C. F. Stearns and Company. The receipt mentioned no amount received.

J. L. FARRAR.

It is agreed that the foregoing deposition shall be read in evidence without supplying caption or certificate.

NINDE & ELLISON, *For Pl'ff.*
R. S. TAYLOR, *For D'f'ts.*

213 Examination of witnesses on behalf of the plaintiff, taken, by agreement, at the office of Coombs, Bell and Morris, in the city of Fort Wayne, Allen county, Indiana.

DANIEL M. FALLS, being duly sworn, testifies as follows:

Q. 1. State your name, age, residence, and occupation.

A. Daniel M. Falls; 52 years old; residence, Fort Wayne, Indiana.

Q. 2. State whether or not you were a partner in the firm of J. C. Bowser & Co. from 1872 to 1877.

A. Yes; I was.

Q. 3. State whether or not you recollect of a judgment taken by Stearn *et al.* against Gardner, Blish & Co., of Peru, Indiana, and your firm.

A. I do not recollect. There were a great number of judgments taken against us.

214 Q. 4. State whether or not you ever consented to or was consulted about any extension of time being given to Gardner, Blish & Co. for the payment of said judgment upon their paying the interest thereon in advance.

A. No, sir; I was not, to the best of my knowledge.

Q. 5. State whether or not, — 1876, during the whole year, you owned property subject to execution in Allen county, Indiana, of the value of two thousand dollars.

A. Yes.

Cross-examination by W. H. COOMBS, Esq.:

Q. 6. What unencumbered property did you own in the year 1876?

A. I believe all the property was encumbered at that time, but I don't know.

Q. 7. Describe the property you owned at that time.

A. I owned a lot in Bloomingdale and a piece of land in Adams township—I think it was below New Haven—containing about sixty-one acres.

215 Q. 8. What was the lot in Bloomingdale worth at that time?

A. I suppose it was worth $150.00 or $200.00.

Q. 9. In what manner and for how much was it encumbered?

A. It was not encumbered at all, except by reason of judgments against the firm of J. C. Bowser & Co.

Q. 10. What was the land worth at that time?

A. I don't know. The firm took the land on a debt, and it was charged to me at $700.00, I think.

Q. 11. How did you acquire title to that land?

A. I think the man who owned it conveyed it to me.

Q. 12. Had you at that time, in 1876, property enough to pay all your debts for which you were liable?

A. At the time that land was charged to me we were in pretty good shape. I could not say.

216 Redirect examination:

Q. 13. State whether or not you ever took any part in the management of the financial part of the firm of J. C. Bowser & Co.

A. No, sir.

D. M. FALLS.

JACOB J. KEARN, being duly sworn, testifies as follows:

Q. State your name, age, and residence.

A. Jacob J. Kearn; age, 33 years; residence, Fort Wayne, Indiana.

Q. What official position do you now hold?

A. Deputy clerk of the Allen circuit court.

Q. How long have *have* you held that position?

A. Nearly six —.

Q. I hand you now a paper marked on the margin "Exhibit No. 1, attached to deposition of Jacob J. Kearn; George D.
217 Crane, notary." State whether you have compared it with an original execution on file in said clerk's office.

A. I have examined it and compared it.

Q. State whether or not, with the exception of the certificate attached to it, it is a copy of said original execution.

A. It is a full, true, and complete copy of said original execution and the sheriff's return.

Q. I now place in your hands a paper marked "Exhibit No. 2, attached to the deposition of Jacob J. Kearn; Geo. D. Crane, notary." State whether you have compared it with an original execution.

It is admitted by both parties that the "Exhibits No-. 1, 2, 3, 4, & 5, attached to the deposition of Jacob J. Kearn; Geo. D. Crane, notary," are, as they purport to be, copies of the several executions and *vendis.* mentioned in plaintiffs' bill of complaint as issued on the

judgment of Stearns *et al.* against Gardner, Bliss & Co., as
218 principals, and Jacob C. Bowser & Co., as sureties, together with the endorsements now appearing thereon and the sheriff's return endorsed thereon.

Examined by T. E. ELLISON, att'y for pl'ff:

Q. You say you have examined the original executions and *vendis.* State, if you know, in whose handwriting the written portions of the executions and *vendis.* are in.

A. I do know in whose handwriting they are in.

Q. Who wrote the executions and the clerk's endorsements thereon?

A. John Fleming.

Q. Who wrote the written part of these words now appearing on the back of *fi. fa.* No. 9160: "Judgment, May 12, 1873;" "without appraisement;" "judgment, $2,212.85;" "4.70;" "execution, 1.50;" "credits De. 31, 1873, $354.93; Jan'y 7, 1874, $145.07;" "int. paid to Jan. 1, '77?"

219 A. Those parts are in the handwriting of John Fleming.

Q. Who wrote the written part of these words now appearing on the back of *fi. fa.* 9351:

"Judgment May 12th, 1873."
"Without appraisement."
"Int., 6%."

"Judgment	$2,212 85"
"Costs, balance	4 70"
"Execution	1 50"
"Credits Dec. 31, 1873	354 93"
" Jan'y 1, 1874	145 07"
	$

A. Those parts are in the handwriting of John Fleming.

Q. I now call your attention to some papers pasted in the Judgment Docket of the Allen circuit court, No. 8, on page 45, opposite entry of the judgment of Herman E. Stearne *et al.* against Reuben Gardner *et al.*, the first, dated Peru, May 11, 1874, for interest; the second, Dec. 31, 1873, for $354.93; the third, dated Jan'y 7, 1874, for $145.07; the fourth, dated July 20, 1876, for interest, all
220 purporting to be signed H. E. & C. F. Stearne & Co. and executed to Gardner, Blish & Co. I also call your attention to some writing on said page of said Judgment Docket immediately under said receipts. I ask you in whose handwriting said writing is.

A. In the handwriting of John Fleming.

Q. State whether or not said writing is copy of said receipts.

A. This handwriting is copy of three of said receipts, being the first three described in question No. —. The entry, instead of being a copy, reads as follows: "Rec'd of Messr-. Gardner, Blish and Co. — dollars for interest to Jan. 1st, 1877, on judgment rendered, &c., H. E. and C. F. Stearns & Co." S. L. A. July 20, 1876.

Q. I call your attention now to these words, "Filed Oct. 12th, 1876," on the back of said receipt, dated July 20, 1876, and
221 ask you in whose handwriting that is, if you know.

A. It is John Fleming's.

Q. State, if you know, in what capacity John Fleming acted in said clerk's office from January 1, 1875, to July 6th, 1878, if any.

A. As deputy clerk.

Cross-examination by R. S. TAYLOR:

Q. Do you know of your own knowledge that John Fleming acted as deputy clerk continuously between the dates you name?

A. Yes, sir.

Q. I will ask you to state whether the receipt which you have mentioned, for $354.93, dated Dec. 31, 1873, and the one for $145.07, dated Jan'y 7, 1874, pasted in the judgment docket, are not both on one piece of paper, and each marked in red ink across the face with the word "duplicates."

222 A. That is the fact as to the two receipts pasted in the judgment docket.

Q. Do you know the date when John Fleming ceased to act as deputy clerk?

A. To the best of my information, November 4, 1878.

Redirect:

Q. Look at these receipts pasted in the judgment docket and the manner in which they are pasted and state whether or not the paper on which the two receipts are written was not pasted in either at the same time or before the one on which the words "Filed Oct. 12, 1876," appear.

A. Yes, sir.

Recross:

Q. The fact is, is it not, that the paper containing the two receipts is attached to the judgment docket by gum or glue
223 covering about half an inch in breadth of the upper half of the left-hand margin of the paper, and the receipt dated July 20, 1876, is pasted or fastened with glue or gum covering about half an inch of its left-hand margin, and that the genuine portion of the last-mentioned receipt laps over the gum-ed margin of the first-mentioned paper and extends a short distance above on the surface of the docket?

A. Yes, sir.

JACOB J. KERN.

F. H. WOLKE, being duly sworn, testifies as follows:

Q. Sate you name, age, and residence.

A. Francis H. Wolke; age 48 years; Fort Wayne, Ind.

Q. What official position did you hold from November, 1874, to November, 1878?

A. I was clerk of the Allen circuit court.

224 Q. As such did you have custody of the books and records of that court?

A. Yes, sir.

Q. I present to you *vendi.* No. 9764, in case of Stearns *et al. vs.* Gardner *et al.* Examine it and state if you know in whose handwriting the written part thereof is.

A. I do know.

Q. State whose it is.

A. John H. Fleming'-.

Q. In what capacity did he act for you?

A. As one of my clerks.

Q. Was he the only clerk by the name of Fleming you had?

A. Yes, sir.

Q. How long did he so act?

A. During my entire term of office.

Q. What duties did he perform?

A. General duties about the office; issued fee bills, executions, &c.

225 Q. I will ask you what book this is that purports to be Judgment Docket 8 of the Allen circuit court?

A. It is the judgment docket 8 of the Allen circuit court.

Q. I call your attention to some receipts posted on page 45 of said judgment docket opposite the record of the judgment of Stearns *et al.* against Gardner *et al.* State what was the practice in your office when receipts on judgments were brought in on lo-se pieces of paper.

(Counsel for defendant Bass objects to the foregoing question on the ground that it is incompetent, immaterial, and irrelevant testimony in this cause.)

A. The custom was to endorse the receipts or papers on the back by filing them, with the date they were brought in, and posting them in the judgment docket.

226 Q. What was your instruction to your clerks on the subject mentioned in my last question?

Counsel for Bass objects to this question on the same grounds as to the previous question.

A. My instructions were to file all such papers, with the date they came in, and post them in the judgment docket opposite the case to which they applied.

Q. I see on the back of *fi. fa.* No. 9160 these words:

"Credits Dec. 31, 1873 ..... $354 93
Jan. 7, 1874 ..... 145 07

$ "

and "Interest paid to Jan. 1, '77." In whose handwriting is that?

A. John H. Fleming'-.

Q. What was the custom of your office, when you issued an exe-

cution, as to endorsing payments made on the judgment, and what were your instructions to your clerks on that subject?

A. My instructions to my clerks were, in issuing executions, to endorse on the back the several payments that the judgment
227 docket showed, with the date and amounts.

Cross-examination:

Q. Upon the receipts posted in the docket now before you, being the Judgment Docket 8 of the Allen circuit court, page 45, opposite the judgment of Stearns *et al.* against Gardner *et al.*, you may state whether there are any endorsements of filing in your office.

A. There is a filing upon the receipt dated Peru, Ind., July 20th, 1876. There is no filing on the others.

Q. Do you know the handwriting of Jacob C. Bowser?

A. I do.

Q. You may state whether the endorsement in these words, "Stearns & Co., two rec'pts, amounting in total to $500, paid on judgment," is in the handwriting of J. C. Bowser.

A. Yes, sir; it is.

228 Q. You may state what was the character of John H. Fleming as a deputy clerk—whether or not he was ordinarily careful and accurate in the discharge of his duties.

A. He was.

Q. When was that receipt dated July 20, 1876, filed in your office?

A. October 12, 1876.

Q. Have you any knowledge or means of knowledge as to when the other receipts were filed in the office or posted in the office?

A. I have not.

F. H. WOLKE.

EXHIBIT No. 1. Attached to Deposition of Jacob J. Kern. Geo. D. Crane, Notary.

STATE OF INDIANA, } ss:
Allen County, }

State of Indiana to the sheriff of Allen county, Greeting:

Whereas heretofore, to wit, on the 12th day of May, 1873, Herman E. Stearns, Charles F. Stearns, and Moses Oppenheimer,
229 by the consideration and judgment of the Allen civil circuit court, then pronounced and entered, recovered against Reuben Gardner, Andrew C. Gardner, and Henry Blish, as principals, and Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls, as sureties, judgment for the sum of twenty-two hundred and twelve dollars and eighty-five cents for damages in an action of debt, and also the further sum of four dollars and 70 cents for the balance of costs and charges about the recovery thereof in that behalf expended:

Where*fore* the said Reuben Gardner, Andrew C. Gardner, Henry Blish, Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls were convicted, as appears of record:

Therefore you are hereby commanded to levy the said sums of money of the property of the defendants within your bailiwick subject to execution, and have the money at the clerk's office,
230 together with interest at the rate of six per cent. per annum on the amount of said judgment, due from Jan. 1, 1877, to satisfy said judgment, interest, and costs; also one dollar and fifty cents for this writ; and return this writ within one hundred and eighty (180) days with your doings thereon.

In testimony whereof I, F. H. Wolke, clerk of said court, have hereunto set my hand and affix- the seal thereof this 12th day of June, 1877.

[Seal Allen Circuit Court.]

F. H. WOLKE, *Clerk.*

(Endorsement on back by clerk:) *Fi. fa.* No. 9160. Allen civil circuit court. Herman *et* Stearns *et al. vs.* Reuben Gardner *et al.* Judgment, May 12, 1873, without appraisement. Judgment,
231 $2,212.85; clerk's bal. due, $4.70; execution, $1.50. Credits: Dec. 31, 1873, $354.93; Jan'y 7, 1874, $145.07. Return according to law. F. H. Wolke, clerk. Interest paid to Jan. 1, '77. Filed November 26, 1877. F. H Wolke, clerk. Farrar and Farrar, plaintiffs' attorneys.

The sheriff will first exhaust the property of Gardner, Gardner, and Blish, principals.

(*Sheriff's Return.*)

By virtue of this execution I have this 26th day of June, A. D. 1877, levied upon lots number- one hundred and sixteen and one hundred and seventeen, original or old plat of the city of Fort Wayne, Allen county, Indiana.

C. A. MUNSON, *Sheriff,*
By PLATT J. WISE, *Dept.*

And, after having duly advertised the above-described real estate for sale according to law, I did, at the time and place desig-
nated in said advertisement, to wit, on the twenty-first
232 day of July 1877, between the hours of one and four o'clock of said day, first, by public auction, offer the rents and profits for a period not exceeding seven years, lot No. 116 and then lot No. 117 and then lots No-. 116 and 117, and, no person bidding, I then in like manner offered the fee simple or all the right, title, and interest of the defendants in and to lot No. 116 and then lot No. 117 and then lots 116 and 117, and, no person bidding, the same remains unsold for want of bidders.

C. A. MUNSON, *Sh'ff,*
By P. J. WISE, *Dept.*

Accrued to Sentinel Co. --	$7 80
" Munson -----	3 30
	11 10

After having duly readvertised the above-described real estate for sale, to wit, on the twenty-first day of September, A. D. 1877, between the hours of one and four o'clock p. m. of said day, at
233 the door of the court-house, in Allen county, by public auction, first offered the rents and profits of said premises for a period not exceeding seven years, as follows, to wit: First, lot. No. 116 and then lot No. 117 and lots 116 and 117, and, no person bidding at any or either offer, I then offered the fee simple or all the right, title, and interest of the defendants in and to said real estate in parcels as follows: First, lot No. 116 and then lot No. 117 and then lots No-. 116 and 117, and, no person bidding at any offer, the same remains unsold for want of bidders.

Sept. 21, 1877.

CHARLES A. MUNSON, *Sh'ff*,
By PLATT J. WISE, *Deputy*.

Sentinel Pt. Co.	$7 20
Accrued to sh'ff	3 30
	$10 30

The sheriff will please return this execution and the clerk will issue *vendi*.

234 This execution is returned, levy endorsed. Clerk will please issue *vendi*.

C. A. MUNSON, *Sh'ff*,
By PLATT J. WISE, *Dept*.

STATE OF INDIANA, *Allen County*, } *ss:*

I, Willis D. Maier, clerk of the Allen circuit court, do hereby certify that the above and foregoing is a full, true, perfect, and complete copy of a certain writ of execution issued by the clerk of said court upon a certain judgment entered by said court on the 12th day of May, 1873, wherein Herman E. Stearns, Charles F. Stearns, and Moses Oppenheimer were plaintiffs and Reuben Gardner, Andrew C. Gardner, Henry Blish, Jacob C. Bowser, Joseph R. Prentiss, and Daniel M. Falls were defendants, together with the return of the sheriff thereon endorsed, as the same appears and remains on
235 file in my office.

In testimony whereof I, Willis D. Maier, clerk of said court, have hereunto set my hand and affixed the seal thereof this 30th day of September, 1884.

[SEAL.]

WILLIS D. MAIER,
Clerk Allen Circuit Court.

EXHIBIT No. 2. Attached to Deposition of Jacob J. Kern. Geo. D. Crane, Notary.

STATE OF INDIANA, *Allen County,* } *ss:*

State of Indiana to the sheriff of Miami county, Greeting:

Whereas heretofore, to wit, on the 12th day of May, 1873, Herman E. Stearns, Charles F. Stearns, and Moses Oppenheimer, by the consideration and judgment of the Allen civil circuit court, then pronounced and entered, recovered against Reuben Gardner, Andrew C. Gardner, and Henry Blish, as principals, and Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls, as surities, judgment for the sum of twenty-two hundred and twelve dollars and eighty-five
236 cents for damages in an action of debt, and also the further sum of four dollars and 70 cents for the balance of costs and charges about the recovery thereof in that behalf expended, whereof the said Reubin Gardner, Andrew C. Gardner, Henry Blish, Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls stand convicted, as appears of record, therefore you are hereby commanded to levy the said sum of money of the property of the defendants within your bailiwick subject to execution, and have the money at the clerk's office, together with interest, at the rate of six per cent. per annum, on the amount of said judgment from the first day of January, 1877, to satisfy said judgment, interest, and costs; also one dollar and fifty cents for this writ; and return this writ within one hundred and eighty (180) days with your doings thereon.

237 In testimony whereof I, F. H. Wolke, clerk of said court, have hereunto set my hand and affixed the seal thereof this 9th day of October, 1877.

[Seal Allen Circuit Court.]

F. H. WOLKE, *Clerk.*

(Endorsement on back by clerk:) *Fi. fa.* No. 9351. Allen civil circuit court. Herman E. Stearns *et al. vs.* Reuben Gardner *et. al.* Judgment, May 12, 1873, without appraisement. Int., 6%; judgment, $2,212.85; costs, balance, $4.70; execution, 1.50. Credits: Dec. 31, 1873, $354.93; Jan'y 1, 1874, $145.07. Return according to law. F. H. Wolke, clerk. Farrar and Farrar, plaintiffs' attorneys.

The sheriff will first exhaust the property of Gardner, Gardner, and Blish, principals.

(*Sheriff's Return.*)

STATE OF INDIANA, *Miami County:*

238 This writ came to my hands on the 12th day of October, 1877; that immediately thereafter of Gardner, Blish & Co. I demanded the money on this execution, which they, Henry Blish and Andrew C. Gardner, neglected and refused to pay, and, after making diligent inquiry and diligent search for goods and property

on which to levy, I could find no property of any kind on which to levy this writ. I therefore return the same, No goods and chattels found belonging — said Gardner, Blish & Co. or any of them.

Peru, October 25, 1877.

VINCENT O'DONALD, *Sh'ff.*

Sh'ff fees, $1.50.

STATE OF INDIANA, } ss:
Allen County, }

I, Willis D. Maier, clerk of the Allen circuit court, do hereby certify that the above and foregoing is a full, true, perfect, and complete copy of a certain writ of execution issued by the clerk of said court upon a certain judgment entered by said court on the
239 12th day of May, 1873, wherein Herman E. Stearns, Charles F. Stearns, and Moses Oppenheimer were plaintiffs and Reubin Gardner, Andrew C. Gardner, Henry Blish, Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls were defendants, togethwith return of the sheriff thereon endorsed, as the same appears and remains on file in my office.

In testimony whereof I, Willis D. Maier, clerk of said court, have hereunto set my hand and affixed the seal thereof this 30 day of September, 1884.

[SEAL.]

WILLIS D. MAIER,
Clerk Allen Circuit Court.

EXHIBIT No. 3. Attached to Deposition of Jacob J. Kern. Geo. D. Crane, Notary.

STATE OF INDIANA, } ss:
Allen County, }

The State of Indiana to the sheriff of Allen county, Greeting:

Whereas heretofore, to wit, on the 12th day of May, 1873,
240 Herman E. Stearns, Charles F. Stearns, and Moses Oppenheimer, by the consideration and judgment of the Allen civil circuit court, then pronounced and entered, recovered against Reuben Gardner, Andrew C. Gardner, and Henry Blish, as principals, and Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls, as surities, judgment for the sum of twenty-two hundred and twelve (2,212) dollars and eighty-five cents for damages in an action of debt, and the further sum of — dollars and — cents for the costs and charges about the recovery thereof in that behalf expended, whereof the said Reuben Gardner, Andrew C. Gardner, Henry Blish, Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls were convicted, as appears of record;

And whereas, on the twelfth day of June, 1877, a writ of execution was duly issued by the clerk of said court, directed to
241 you, which writ was, on the 26th day of November, 1877, returned by you with the following endorsement of levy, viz: By virtue of this execution I have this 26 day of June, 1877, levied

upon lots numbered one hundred and sixteen and one hundred and seventeen, original or old plat of the city of Fort Wayne, Allen county, Indiana. * * * This execution is returned (no person bidding), levy endorsed.

Clerk will please issue *vendi.*

Nov. 26, 1877.

C. A. MUNSON, *Sheriff,*
By PLATT J. WISE, *Deputy.*

You are therefore hereby commanded that of the said property so levied upon and remaining unsold to cause to be made according to law the said judgment, interest, and costs accrued and to accrue thereon, and on failure to realize from said property so taken by virtue of said execution the full amount of said judgment, interest thereon, and costs, as well as accruing costs, you are com-
242 manded that of the other goods, chattels, lands, and tenements of the defendant in your bailiwick you cause to be made the balance remaining unpaid of said judgment, interest, and costs, and that you have those moneys at the clerk's office of said court according to law to render unto said plaintiff his judgment, interest thereon, and costs; also two dollars for this writ, docketing, filing, return, &c., and that you have this writ before said judge of said court at the clerk's office within one hundred and eighty days from the date of the same.

Seal Allen Circuit Court.

In testimony whereof I, F. H. Wolke, clerk of said court, hereunto subscribe my name and affix the seal thereof, at Fort Wayne, this 26th day of November, 1877.

F. H. WOLKE, *Clerk.*

(Endorsement on back by clerk:) No. 9465. *Vendi. ex-*
243 *ponas.* Herman E. Stearns *et al. vs.* Reuben Gardner *et al.* Judgment, May 12, '73, $2,212.85; int., 6%; costs accrued, 27.60; This writ, 2; without appraisement. Return according to law. F. H. Wolke, clerk. Farrar and Farrar, att'ys for pl'ff-. Filed April 3, 1878. F. H. Wolke, clerk.

(*Sheriff's Return.*)

Advertised for sale December 22d, 1877, by posting up printed notices in three public places in Wayne township and one at the door of the court-house of Allen county, and by publication for three weeks successively next before the day of sale in the Fort Wayne Weekly Sentinel, a weekly newspaper of general circulation printed and published in said county; said sale was set for the 22d day of December, 1877, and I did, on said day, at the door of the court-house of said county, expose to sale the rents and profits, for a term not exceeding seven years, of said real estate in par-
244 cels, and, no person bidding, I then offered the fee simple in

parcels, and, no person bidding, the same remains unsold for want of bidders.

December 22, 1877.

CHARLES A. MUNSON, *Sh'ff*,
By PLATT J. WISE, *Deputy*.

Accrued to Sentinel Pt. Co..... $7 20
Accrued to Munson..... 4 30

STATE OF INDIANA, } ss:
Allen County, }

I, Willis D. Maier, clerk of the Allen circuit court, do hereby certify that the above and foregoing is a full, true, perfect, and complete copy of a certain writ of *vendi. exponas* issued by the clerk of said court upon a certain judgment entered by said court on the 12th day of May, 1873, wherein Herman E. Stearns, Charles F. Stearns, and Moses Oppenheimer were plaintiffs and Reuben Gardner, Andrew C. Gardner, Henry Blish, Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls were defendants, together with
245 the return of the sheriff thereon endorsed, as the same appears and remains on file in my office.

In testimony whereof I, Willis D. Maier, clerk of said
[SEAL.] court, have hereto set my hand and affixed the seal thereof this 30th day of September, 1884.

WILLIS D. MAIER,
Clerk Allen Circuit Court.

EXHIBIT No. 4. Attached to Deposition of Jacob J. Kern. Geo. D. Crane, Notary.

STATE OF INDIANA, } ss:
Allen County, }

The State of Indiana to the sheriff of Allen county, Greeting:

Whereas heretofore, to wit, on the twelfth day of May, 1873, Herman E. Stearns, Charles F. Stearns, and Moses Oppenheimer, by the consideration and judgment of the Allen civil circuit court, then pronounced and entered, recovered against Reuben Gardner, Andrew C. Gardner, and Henry Blish, as principals, and Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls, as sureties, judgment
246 for the sum of twenty-two hundred and twelve dollars and eighty-five cents for damages in an action of debt, and also the further sum of forty-one dollars and ten cents for the costs and charges about the recovery thereof in that behalf expended, whereof the said Reuben Gardner, Andrew C. Gardner, Henry Blish, Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls were convicted, as appears of record.

And whereas, on the 12th day of June, 1877, a writ of execution was duly issued by the clerk of said court, directed to you, which writ was, on the 26th day of November, 1877, returned by you with the following endorsement, viz:

By virtue of this execution I have, this 26th day of June, A. D. 1877, levied upon lot- numbered one hundred and sixteen (116) and one hundred and seventeen (117), original or old plat of the city of Fort Wayne, Allen county, Indiana.

247 * * * This execution is returned (no person bidding) with levy endorsed.

CHARLES A. MUNSON, *Sheriff*,
By PLATT J. WISE, *Deputy*.

You are therefore hereby commanded that of the said property so levied upon and remaining unsold you cause to be made, according to law, the said judgment, interest, and costs accrued and to accrue thereon, and on failure to realize from said property so taken by virtue of said execution the full amount of said judgment, interest thereon, and costs, as well as accruing costs, you are commanded that of the other goods, chattels, lands, and tenements of the defendant- in your bailiwick you cause to be made the balance remaining unpaid of said judgment, interest, and costs, and that you have those moneys at the clerk's office of said court according to law, to render unto said plaintiff his judgment, interest thereon, and

248 costs; also one dollar and fifty cents for this writ, docketing, filing, and return, and that you have this writ before said judge of said court at the clerk's office within one hundred and eighty days from the date of the same.

In testimony whereof I, F. H. Wolke, clerk of said court, hereunto subscribe my name and affix the seal thereof, at Fort Wayne, this 5th day of July, 1878.

[Seal Allen Circuit Court.]

F. H. WOLKE, *Clerk*.

(Endorsement on back by clerk:) No. 9764. *Vendi. exponas.* Herman E. Stearns *et al. vs.* Reuben Gardner *et al.* Judgment, May 12th, '73, $2,212.85; int., 6%; costs accrued, $41.10; this writ, $1.50; without appraisement. Return according to law. Frank H. Wolke, clerk. Robert Stratton, att'y for pl'ff-.

249 (*Sheriff's Return.*)

This execution is returned unsatisfied; the within levy released. Clerk will please issue *alias* execution.

July 6, '78.

C. A. MUNSON, *Sh'ff*,
By PLATT J. WISE, *Dep.*

STATE OF INDIANA, } ss:
Allen County, }

I, Willis D. Maier, clerk of the Allen circuit court, do hereby certify that the above and foregoing is a full, true, perfect, and complete copy of a certain writ of *vendi. exponas* issued by the clerk of said court upon a certain judgment entered by said court on the

12th day of May, 1873, wherein Herman E. Stearns, Charles F. Stearns, and Moses Oppenheimer were plaintiffs and Reuben Gardner, Andrew C. Gardner, Henry Blish, Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls were defendants, together with the return of the sheriff thereon endorsed, as the same appears and remains on file in my office.

In testimony whereof I, Willis D. Maier, clerk of said court, have hereunto set my hand and affixed the seal thereof this 30 day of September, 1884.

[SEAL.] WILLIS D. MAIER,
Clerk Allen Circuit Court.

250 EXHIBIT No. 5. Attached to the Deposition of Jacob J. Kearn.
George D. Crane, Notary.

STATE OF INDIANA, } ss:
Allen County, }

State of Indiana to the sheriff of Allen county, Greeting:

Whereas heretofore, to wit, on the 12th day of May, 1873, Herman E. Stearns, Charles F. Stearns, and Moses Oppenheimer, by the consideration and judgment of the Allen civil circuit court, then pronounced and entered, recovered against Reuben Gardner, Andrew C. Gardner, and Henry Blish, as principals, and Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls judgment for the sum of twenty-two hundred and twelve dollars and 85 cents for damages in an action of debt, and also the further sum of forty-one dollars and 10 cents for the costs and charges about the recovery thereof in that behalf expended, whereof the said Reuben Gardner, Andrew C. Gardner, Henry Blish, Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls were convicted, as appears of record, therefore you are
251 hereby commanded to levy the said sums of money of the property of the defendants within your bailiwick subject to execution, and have the money at the clerk's office, together with interest, at the rate of 6 per cent. per annum, on the amount of said judgment from the date thereof, to satisfy said judgment, interest, and costs; also one dollar and fifty cents for this writ; and return this writ within one hundred and eighty (180) days with your doings thereon.

In testimony whereof I, F. H. Wolke, clerk of said court, have hereunto set my hand and affixed the seal thereof this 6th day of July, 1878.

[Seal Allen Circuit Court.]

F. H. WOLKE, *Clerk.*

(Endorsement on back by clerk:) *Fi. fa.* No. 9765. Allen civil circuit court. Herman E. Stearns *et al. v.* Reuben Gardner *et al.* Judgment, May 12th, 1873; int., 6%; judgment, $2,212.85; costs accrued, 42.60; execution, 1.50; int. paid to Jan'y 1, '77; with-
252 out appraisement. Return according to law. F. H. Wolke, clerk. Filed —— —, 187–. —— ——, clerk. Robert Stratton, plaintiffs' attorney.

(*Sheriff's Return.*)

By virtue of this execution I have this eighth day of July, A. D. 1878, levied upon the following real estate (no personal property found whereon to levy), to wit: The east half of the northwest quarter of section seventeen (17), in township thirty north, of range thirteen east, excepting ten acres in the northeast corner of said quarter, and also excepting the right of way of the Pittsburgh, Fort Wayne and Chicago railway, containing sixty-eight $\frac{55}{100}$ acres; also the south half of the south half of the southwest quarter of section eight, in township thirty north, range thirteen east; also all of the north part of the west half of the northwest quarter north of the Pittsburgh, Fort Wayne and Chicago railroad, in the west half of the
253 northwest quarter of section seventeen, township thirty north, of range thirteen east, containing twenty-three $\frac{5}{100}$ acres, all in Allen county, Indiana.

CHARLES A. MUNSON, *She'ff*,
By PLATT J. WISE, *Dept.*

Came to hand July 6, 1878, at 11.30 o'clock a. m., and I advertized the within-described real estate by first giving due and legal notice of the time and place of sale for at least twenty days next before the day of sale by posting printed notices thereof in three of the most public places in Adams township and one at the court-house door of Allen county, Indiana, and also by publication for three weeks successively next before the day of sale in the Fort Wayne Weekly Sentinel, a weekly newspaper of general circulation printed and published in said county. Said sale was set for the third day of August, 1878, and I did on said day, at the door of the court-house of said county, between the hours prescribed by law,
254 at public auction, first expose to sale the rents and profits, for a term not exceeding seven years, of said real estate in parcels as follows:

1st. The east half of the northwest quarter of section seventeen, except ten acres in the northeast corner and the right of way of the Pittsburgh, Fort Wayne and Chicago railroad.

2nd. The south half of the south half of the southwest quarter of section eight.

3rd. The two last above described pieces together.

4th. All the north part of the west half of the northwest quarter of section seventeen what [which] lies north of the Pittsburgh, Fort Wayne and Chicago railroad, all the above lands being in township thirty north of range thirteen east.

5th. The entire description as above set forth.

And, no person bidding at any or either offer, I then and there offered at public auction as aforesaid the fee simple of said real estate in parcels as follows, viz:

1st. The east half of the northwest quarter of section sev-
255 enteen, in township thirty north, of range thirteen east, except ten acres in the northeast corner and excepting the right of way of the Pittsburgh, Fort Wayne and Chicago railroad.

2nd. The south half of the south half of the southwest quarter of section eight, township and range aforesaid.

3d. The two pieces of real estate last above described.

4th. All the north part of the west half of the northwest quarter of section seventeen, township and range aforesaid, which lies north of the Pittsburgh, Fort Wayne and Chicago railroad.

And, receiving no bid at any or either offer, I did then and there offer, at public auction as aforesaid, the fee simple of all of said real estate described as follows, to wit:

The east half of the northwest quarter of section seventeen (17), in township thirty (30) north, of range thirteen east, excepting ten (10) acres in the northeast corner of said quarter, and also
256 excepting the right of way of the Pittsburgh, Fort Wayne and Chicago railway, containing sixty-eight and eighty-five one hundredths acres; also the south half of the southwest quarter, of section eight, in township thirty north, of range thirteen east, and also all of the north part of the west half of the northwest quarter north of the Pittsburgh, Fort Wayne and Chicago railroad, in the west half of the northwest quarter of section seventeen, township thirty north, of range thirteen east, containing twenty-three and five one hundredths acres; all the above lands in Allen county, Indiana; and John H. Bass did then and there bid the sum of two thousand dollars, and, no person bidding more, the same was in due form openly struck off to the said John H. Bass, he being the highest and best bidder therefor and that being the highest and best price bid for the same; and the said John H. Bass having paid the
257 amount so by him bid, I executed and delivered to him a certificate of sale of said premises.

And I have paid to the plaintiffs' attorneys	$1,911 50
Paid clerk	44 10
" printer	12 00
Retained my fees	32 40
	$2,000

And this execution is returned partially satisfied Sept. 6th, 1878.

C. A. MUNSON, *She'ff A. Co.*,
By PLATT J. WISE, *Dept.*

Received of Charles A. Munson, sheriff, one thousand eight hundred dollars to apply on this execution.

August 8th, 1878.

J. L. FARRAR,
Pl'ffs' Att'y.

STATE OF INDIANA, } ss:
Allen County, }

I, Willis D. Maier, clerk of the Allen circuit court, do hereby certify that the above and foregoing is a full, true, perfect, and complete copy of a certain writ of execution issued by the clerk

258 of said court upon a certain judgment entered by said court on the 12th day of May, 1873, wherein Herman E. Stearne, Charles F. Stearne, and Moses Oppenheimer were plaintiffs and Reuben Gardner, Andrew C. Gardner, Henry Blish, Jacob C. Bowser, Joseph R. Prentiss, and Daniel M. Falls were defendants, together with the return of the sheriff thereon endorsed, as the same appears and remains on file in my office.

In testimony whereof I, Willis D. Maier, clerk of said court, have hereunto set my hand and affixed the seal thereof this 30th day of September, 1884.

Seal Allen Circuit Court.

WILLIS D. MAIER,
Clerk Allen Circuit Court.

STATE OF INDIANA, *Allen County,* } *ss:*

I, George D. Crane, a notary public in and for said county and State, hereby certify that the above-named Daniel M. Falls,
259 Jacob J. Kearn, and Francis H. Wolke were by me first duly sworn according to law to testify the truth, the whole truth, and nothing but the truth relating to said cause; that their depositions were reduced to writing by me; that the defendants attended by Hon. R. S. Tayler and Hon. Wm. H. Coombs, their attorneys, and said depositions were —, by agreement of counsel for complainant and defendants, at the office of Coombs, Bell & Morris, in the city of Fort Wayne, Allen county, State of Indiana, on the 30th day of September, 1884, between the hours of nine o'clock a. m. and six o'clock p. m. of said day.

In testimony whereof I hereunto set my hand and notarial seal, at Fort Wayne, this 30th day of September, 1884.

[SEAL.]

GEO. D. CRANE,
Notary Public.

260 U. S. Circuit Court.

GEORGE MILMINE
vs.
JOHN H. BASS *et al.*

We agree that depositions of witnesses may be taken in the above-entitled cause on behalf of the complainant on the 26th day of September, 1883, between the hours of nine a. m. and six p. m., and continue from day to day, if necessary, between the same hours, until all are taken.

NINDE & ELLISON, *For Pl'ff.*
COOMBS, BELL AND MORRIS,
Att'ys for Def'd'ts.

ISAAC D'ISSAY, being duly sworn, testifies as follows:

Ques. 1. State your name, age, residence, and occupation, and how long you have been engaged in the same.

Ans. My name is Isaac D'Issay; my age is 44; residence, Fort Wayne, Indiana; I am in real-estate business. I have been engaged in real estate nine years.

Ques. 2. You may state if you have been engaged in that
261 business more or less exclusively for said period, and whether or not you are acquainted with the values of real estate in said city, and of country property through the county.

Ans. I have for the past seven years devoted myself exclusively to real estate; before that I had insurance with it. I am as well acquainted for [as] any who had devoted that much time to the business, and equally well acquainted with property around the city and real estate through the county.

Ques. 3. Please state whether or not you are acquainted with that schedule of lots in Bowserville set forth in the bill of complaint, numbered 17, 18, 31, 34, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, and state what, in your judgment, the fair cash value of said lots is to-day, and what it was in 1877 & '8.

Ans. I will give the cash value to-day: Lot 17, $350; 18, 375;
31, 425; 34, 350; 39, 325; 40, 300; 41, 425; 42, 375; 43, 325;
262 44, 325; 45, 350; 46, 350; 47, 325; 48, 325; 49, 325; and in 1877 & '78, 17, 300; 18, 325; 31, 375; 34, 300; 39, 275; 40, 250; 41, 375; 42, 325; 43, 275; 44, 275; 45, 300; 46, 300; 47, 275; 48, 275; 49, 275.

Cross-examination by the attorney for defendants, Mr. COOMBS:

X Ques. 1. Well, have you recently carefully examined these lots in Bowserville with a view of testifying to their value?

Ans. Yes, sir.

ISAAC D'ISSAY.

JOSEPH W. EDSALL, being duly sworn, deposes as follows:

Ques. 1. State you- name, age, occupation, and place of residence.

Ans. Joseph W. Edsall; twenty-nine; real estate & loan agent; Fort Wayne, Indiana.

Ques. 2. Are you acquainted with the value of property in and about the city of Fort Wayne?

Ans. Yes, sir.

263 Ques. 3. State what the fair cash value is of lots Nos. 116 and 117, Bowserville, in the city of Fort Wayne.

Ans. Real estate to-day is worth in cash what you can get for it. The said property is reasonably worth $12,000.00.

Ques. 4. What do you say it was worth in 1878?

Ans. It was worth about $60 per front foot.

Ques. 5. What would you say is the value of lots 17, 18, 31, 34, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, in Bowserville Addition to the city of Fort Wayne.

Ans. I would judge 17, 18, 31, 34, 41, 42, 43, 44, 45 to be worth

about $400 apiece, at a fair cash value. The other lots—I can't sufficiently recollect the situation to give an intelligent answer as to their value.

Cross-examination.

X Ques. 6. Have you examined these lots in Bowserville or any or either of them with a view of ascertaining their value?

264 Ans. I have on several occasions, in passing through there. In reference to these particular lots, I say no.

X Ques. 7. What, in your judgment, could lots No-. 116 and 117 on the old plat of Fort Wayne be sold for in cash at this time or within three months from this time?

Ans. That would be according to—if I sold it I think I could get in the neighborhood of $100 a foot; I can't state.

J. W. EDSALL.

At the hour of ten o'clock, there being no witnesses here, the counsel for the defendants objects to a further continuance of this course unless other witnesses are produced to-day.

G. L. Bittenger.

Ques. 1. State your name, age, residence, and occupation.

Ans. Geo. L. Bittenger; forty-five; Fort Wayne; attorney and real estate.

Ques. 2. Are you acquainted with the value of real estate in and about Fort Wayne?

265 Ans. I am.

Ques. 3. State what, in your judgment, is the fair cash value of lots 116 and 117, original plat of Fort Wayne.

Ans. Sixteen thousand dollars.

Ques. 4. State what is the value of lots 17, 18, 31, 34, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, in Bowserville Addition to Fort Wayne, Indiana.

Ans. I am not prepared to give an opinion without going and looking at them.

G. L. BITTENGER.

S. F. SWAYNE, being duly sworn, testifies as follows:

Ques. 1. State your name, age, residence, and occupation.

Ans. Sam'l F. Swayne; thirty-seven; Fort Wayne, Indiana; law, insurance, and real estate.

Ques. 2. State whether or not you are acquainted with the value of real estate in and about Fort Wayne, Indiana.

Ans. Yes.

266 Ques. 3. State what, in your judgment, is the fair cash value of lots 116 and 117, old plat of the city of Fort Wayne, Ind.

Ans. They are worth one hundred dollars per front foot.

Ques. 4. State what, in your judgment, — of the lots No-. 17, 18,

31, 34, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, in Bowserville Addition to Fort Wayne.

Ans. Lot- 17 and 18 are worth from $400 to $450 apiece; 31, 450; 34, 300; 39 and 40, from 600 to 650 together; 41 to 49, inclusive, are worth $300 apiece.

Ques. 5. What was the value of said property in 1877 and '78 compared to the present time?

Ans. The North Side property, in my judgment, is worth 20 % more now than in 1878. I mean the lots in Bowserville. Lots 117 and 116, I think, were worth as much then as now, but would be more ready sale now.

Cross-examination:

X Ques. 1. Have you examined these particular lots in
267 Bowserville with a view of testifying to their value?

Ans. No, sir.

S. F. SWAYNE.

H. H. BOSSLER, being duly sworn, testifies as follows:

Ques. 1. State your name, age, residence, and occupation.

Ans. Henry H. Bossler; Fort Wayne, Indiana; fifty-nine; real-estate agent.

Ques. 2. Are you acquainted with the value of real estate in and about Fort Wayne?

Ans. Yes; I suppose so.

Ques. 3. State what, in your judgment, is the fair cash value of lots 116 and 117, old plat of the city of Fort Wayne.

Ans. I think, $12,000.

Ques. 4. State what, in your judgment, was their value in 1877 and 1878.

Ans. I think, about the same.

Ques. 5. State what, in your judgment, is the fair cash value of lots 17, 18, 31, 34, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, in
268 Bowserville Addition to the city of Fort Wayne, Ind.

Ans. Lot 17, 500; 18, 500; 31, 350; 34, 350; 39, 350; 40 400; 41, 350; 42, 300; 43, 300: 44, 300; 45, 350; 46, 350; 47, 300; 48, 300; 49, 300; all, total, $5,000.

Ques. 6. What would you say was their value in 1877 & '78?

Ans. I think, from my recollection, that they were worth about the same.

HENRY H. BOSSLER.

Mr. SIDNEY C. LOMBARD, being duly sworn, testifies as follows:

Ques. 1. State your name, age, residence, and occupation.

Ans. Sidney C. Lombard; 34 years of age; residence, Fort Wayne; real estate and insurance.

Ques. 2. Are you acquainted with the values of property in the city and near it, and have you been for the last seven years?

Ans. Yes; I have.

Ques. 3. State the value of lots No. 116 in the original plat
269 and 117 in the original plat, Fort Wayne.

Ans. They are worth six thousand dollars apiece—$12,000 for the two.

Ques. 4. What were they worth in 1877 and 1878?

Ans. I believe they were worth about that price then.

Ques. 5. State the value of lots 17, 18, 31, 34, 39, 40, 41, 42, 43, 44, 45, 46, 47, and 48, and 49, in Bowserville Addition to the city of Fort Wayne.

Ans. I think they are worth $400 apiece.

Ques. 6. What was their value in 1878?

Ans. I think the same value.

Cross-examination by defendants:

Ques. 7. Do you consider the lots in Bowserville of equal value?

Ans. Those I do—those named—of equal value.

Ques. 8. Was you familiar with the condition of the title of 116 and 117, old plat, in 1882?

Ans. Did not know anything about it and don't know anything now.

270 Ques. 9. Supposed said lots were encumbered with a large mortgage, a large number of tax titles for tax sales by county, city, and for street assessments, held by different persons, what effect, if any, would that have upon the price if sold?

Ans. I don't think it would have any effect on the value. It might have an effect in selling the property with persons who wanted to take advantage of the owners' misfortune.

Ques. 10. Is not the value of property what it could be sold for in the market?

Ans. Not entirely so.

Ques. 11. What other value could there be than the price the property would have in market?

Ans. The rental that the property may or could be made to produce is another element that governs the value with me.

Ques. 12. Would you pay as much for property encumbered as above stated as you would if the title was entirely clear?

271 Ans. I think I should if I could not get it for less and wanted the property.

Ques. 13. What, in your judgment, would that property have sold for at sheriff's sale, if encumbered as above suggested, cash, from 1867 to 1882?

Plaintiff objects to above question.

Ans. Well, from $8,000 to $12,000.

Re-examination:

Ques. 14. State whether or not you know of sales of property in the vicinity of said lots 116 and 117 at as high or higher rate of value as you have fixed.

Ans. Yes.

SIDNEY C. LOMBARD.

K. J. BAUER, being duly sworn, testifies as follows:

Ques. 1. State your name, age, residence, and occupation.

Ans. K. J. Bauer; thirty-three; Fort Wayne; real estate.

Ques. —. Are you acquainted with the value of real estate in and around the city of Fort Wayne?

272 Ans. Yes.

Ques. 3. Are you acquainted with the fair cash value of lots 116 and 117, old plat of the city of Fort Wayne, Indiana, at the present time?

Ans. One hundred dollars per front foot.

Ques. 4. State what it was worth per front foot — 1877 and 1878.

Ans. It was worth about $80 per foot.

Ques. 5. State what is the fair cash value of lots Nos. 17, 18, 31, 34, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, in Bowserville Addition to the city of Fort Wayne, Indiana.

Ans. Lots 17 and 18, $600 apiece; 31, 650; 34, 600; 39, 400; 40, 450; 41, 500; 42 to 49, inclusive, $450 apiece.

Ques. 5. When did you examine these lots in Bowserville last?

Ans. I just came from there.

Cross-examination:

Ques. 6. How long have you been engaged in the real-estate business?

273 Ans. I have been engaged exclusively in the real-estate business for three years last March. I have been figuring in the business for three years.

K. J. BAUER.

Witness fees, 1 day.

Mr. HERMAN MICHAEL, being duly sworn, testifies:

Ques. 1. State your name, age, residence, and occupation.

Ans. My name is Herman Michael; residence; Fort Wayne; my occupation is real estate and insurance.

Ques. 2. Are you acquainted with the value of city property in the city of Fort Wayne?

Ans. I think I am, some.

Ques. 3. Are you acquainted with the value of lots No. 116 and 117, in old plat, addition to the city of Fort Wayne? If so, please state what said property was in value, at cash, in 1877 and '8, and what its cash value is now.

Ans. Its cash value now is probably $100 a foot. I cannot
274 say what it was worth in 1877 and '8; it must have been worth about $10,000 at that time.

Cross-examination:

Ques. 1. Have you bought or sold any property in that neighborhood in the last five or six years?

Ans. I have bought and sold property within three or four squares of that property.

Ques. 2. What lot have you bought or sold within three or four squares of that property within that time?

Ans. It was part of the Campbell's property; I can't remember now the number; it is on East Berry street, between Clay and Monroe.

Ques. 3. How much did that bring per front foot?

Ans. Twenty-five dollars per front foot.

Re-examination:

Ques. 1. State what you know, if anything, about other property being sold in the neighborhood of the Bowser property, and
275 the price at which such sales were made.

Ans. The site of the Presbyterian church was sold for $25,000. Mr. Geismer has bought, within two months, of Judge Carson, at $110 per front foot, within a square and a half of the Bowser lot, on E. Berry street. We sold as agents 30 x 60 feet to Mr. Fleming, for Mr. Fee, for $4,000. We are connected.

Ques. 2. Describe the situation of the church property, sold to the Government, and the amount of it; the Carson property, sold to Geismer, and the amount of it, and the Fee property, sold to Fleming, and the amount of it. State how near each of these pieces is to the Bowser property.

Ans. The church property is situated on the corner of Clinton and Berry streets, sixty feet from the Bowser property. The size of the church property is the same as the Bowser property, 120 feet by 150 feet. The Fee property, sold to Fleming, is on the northeast corner of Clinton and Berry streets. The Carson property, sold to Geismer, is between Barr and Lafayette, and is forty (40) feet front by
276 150 feet deep, within fifty feet of Lafayette street. The Bowser property is situated between Barr and Clinton streets, on the south side of Berry street, and is 120 feet front by 150 feet deep.

Ques. 3. I will ask you to state the value of lots 17, 18, 31, 34, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, in Bowserville.

The defendants' counsel objects to the question, and also to the next.

Ans. Lot 17, 500; 18, 500; 31, 600; 34, 450; 39, 400; 40, 350; 41, 350; 42, 300; 43, 300; 44, 300; 45, 350; 46, 350; 47, 300; 48, 300; 49, 300.

Ques. 4. What was said value of each of said lots in 1877 and 1878?

Objected to by the defendants.

Ans. I don't think there was much difference between the value then and now. It ain't increased much since then.

Ques. 5. Are you acquainted with the S. ½ of the S. W. ¼, sec. 8, town. 30 north, range 13 east; also the east ½ of the northwest quarter of section seventeen (17), township 30 north, range thir-
277 teen east, except ten (10) acres in *in* the northeast corner and right of way granted to the Ohio and Indiana Railroad Company, and also all that part of the west ½ of the northwest ¼ of section seventeen, township thirty (30) north, of range thirteen east,

which lies north of the grounds of the Ohio and Indiana Railroad Company, containing twenty-three and $\frac{5}{100}$ acres, all being in the county of Allen and State of Indiana?

Ans. I am acquainted with it according to the plat of the map. I know the neighborhood in which — property is located.

Ques. 6. Please state what, in your judgment, is the fair cash value of said property.

Ans. About seventy-five dollars per acre.

Ques. 7. What was said value of said property in July, 1878?

Ans. I think about the same.

Ques. 8. State whether or not it has remained about the same value from 1878 to the present time.

278 Ans. Yes.

The plaintiff's counsel here requests the defendants' counsel to make any cross-examination he may desire upon the new matter interrogated about in the foregoing recross-examination.

Ques. 9. Do you know of your own knowledge the quality of the land embraced in question number 5 and your answer thereto?

Ans. I do not.

Ques. 10. Do you know of your own knowledge whether said land or any part thereof is improved?

Ans. I do not.

Ques. 11. Do you know of your own knowledge whether said land is high or low or wet or dry?

Ans. I do not.

HERMAN MICHAEL.

Witness fees, 1 day.

Mr. DAVID C. FISHER, being duly sworn, testifies as follows:

279 Ques. 1. State your name, age, residence and occupation.

Ans. I am 38; insurance and real estate; David C. Fisher, Fort Wayne.

Ques. 2. How long have you been engaged in the real-estate business?

Ans. I have been engaged in it about seventeen years.

Ques. 3. Have you a knowledge of the values of real estate in the city of Fort Wayne and of Allen county?

Ans. I think I have.

Ques. 4. Are you acquainted with the value of the lots 116 and 117, old plat, being the residence of Jacob C. Bowser?

Ans. Yes, sir; I am.

Ques. 5. State what the fair cash value of said property is.

Ans. I should say that property is worth about $100 per front foot.

Ques. 6. What was its said value in 1877 and 1878?

Ans. Well, I think I should say about the same price then.

Ques. 7. Are you acquainted with *with* lots 17, 18, 31, 34,

280 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, in Bowserville Addition to the city of Fort Wayne?

Ans. I am.

Ques. 9. State what that value is.

Ans. I shall value the following lots as follows: Lot No. 17, $500; No. 18, $500; 31, $600; 34, $450; 39, $400; 40, $350; 41, $350; 42, $300; 44, $300; 43, $300; 45, $350; 46, $350; 47, $300; 48, $300; 49, $300.

Ques. 10. State what the said value of each of the lots was in 1877 and 1878.

Ans. Well, I don't know. I should say 10% less than now.

Ques. 11. Are you acquainted with the fair cash value of the S ½ S. W. ¼, sec. 8, T. 30 N., range 13 east; also the east ½ N. W. ¼, sec. 17, 30, 13 east, except 10 acres in the northeast corner and right of way granted to Ohio and Indiana Rail R. Company, and also that part of the W. ½ N. W. ¼, sec. 17, 30, 13 east, which lies north of the grounds of the Ohio and Indiana railroad, all in Allen county, Indiana?

Ans. I am not.

281 Cross-examination:

—. Have you examined the several lots in Bowserville referred to in question 7 with the view of testifying to their value in this case?

Ans. I have not.

D. C. FISHER.

Witness fees, 1 day.

Mr. ANDREW F. GLUTTING, being duly sworn, testifies as follows:

Qu-s. 1. State your name, age, residence, and occupation.

Ans. Andrew F. Glutting; 29 years old; residence, Fort Wayne; real-estate and insurance agent.

Ques. 2. State whether you are acquainted with the value of property at Fort Wayne and the county of Allen, and how long have you had occasion, if at all, and how, to know the values of property.

Ans. I am acquainted with values. I have had occasion to know values for ten years in my occupation as deputy recorder and real-estate and insurance *insurance* agent.

282 Ques. 3. Are you acquainted with the values of lots 116 and 117, original plat of said city? If so, please state what the fair cash value of the said property is.

Ans. Well, the value is about $100 a front foot.

Ques. 6. State what said value of said property was in 1877 and from that to the present time.

Ans. I think the property was worth in 1877 20 % less than it is at the present time—$80 a front foot.

Ques. 7. How much in 1878, in your judgment?

Ans. I think it was about the same. I think the property increased 10 % in 1880 and the balance of the difference since.

Ques. 8. State whether you are acquainted with lots Nos. ——.

Ans. I am, in a general way.

283 Ques. 9. What is the fair cash value of each of said lots.

Ans. 17, 500; 18, 500; 31, 600; 34, 450; 39, 400; 40, 350; 41, 350; 42, 300; 43, 300; 44, 300; 45, 350; 46, 350; 47, 300; 48, 300; 49, 300.

Ques. 10. State what the fair cash value of each of said lots was in 1877 and 1878.

Ans. I think they were 25 % less. I think the change took place in the fall of 1881 and spring of 1882.

Ques. 11. Are you acquainted with the fair cash value of the S. ½ S. W. ¼, section eight, town. thirty north, range 13 east; also the east ½ northwest ¼, section seventeen, town. thirty north, range 13 east, except ten acres in the northeast corner and right of way granted to Ohio and Indiana Railroad Company, and also that part of the west half N. W. ¼, sec. 17, town. 30 north, range 13 east, which lies north of the grounds of the Ohio and Indiana

284 railroad, all in Allen county and State of Indiana?

Ans. I am, in a general way.

Ques. 12. State what the fair cash value of said property is.

Ans. It is worth seventy-five dollars an acre.

Ques. 13. What was said value in *in* 1877 and 1878?

Ans. It was ten per cent. less.

Cross-examination by defendants:

Ques. 14. Have you examined each of said lots in Bowserville with a view of testifying to their value in this case?

Ans. I have not.

Ques. 15. Did you not, a few moments since, consult with the other witnesses—D. C. Fisher, Michaels—in relation to the value of these lots, and do you not base your valuation as much upon their judgment as your own?

285 Ans. I did consult with them, but rely on my own judgment.

ANDREW F. GLUTTING.

Witness fee, 1 day.

ROBERT STRATTON, being duly sworn, testifies as follows:

Ques. 1. State your name, age, residence, and occupation.

Ans. Robert Stratton; thirty-eight years old, and am a lawyer.

Ques. 2. Do you know the defendant, John H. Bass?

Ans. Yes; I know him.

Ques. 3. Did you ever have any connection with the collection of a judgment taken by Stearns *et al.* against Bowser *et al.*?

Ans. I had an incidental connection with it. I was an attorney for other parties holding a judgment against Bowser *et al.* and was endeavoring to collect that judgment by execution and *vendi.* at the same time that Mr. Farrar, who was attorney for the plaintiffs in Stearns *et al. v.* Bowser *et al.*, was endeavoring to collect that judgment, and Mr. Farrar and I were acting in concert in the matter.

286 He, living at Peru, asked me to look after the matter some here, and in pursuance of that arrangement I think that I

ordered an execution or *vendi.* in his case at one time. I find from the precipe book that I did order an execution on the 5th day of July, 1878.

Ques. 4. What do you know of any effort being made to collect the Stearns judgment out of the Bowser homestead, being lots 116 and 117, old plat?

Ans. My impression or recollection is that there was a levy made on the Bowser homestead on the Stearns judgment, and an offer to sell on that levy.

Ques. 5. What negotiations, if any, did the defendant, Mr. Bass, have with you or Mr. Farrar in regard to the sale of that property?

Ans. I don't think I can say we had any negotiations in regard to the property. We had some conversation in regard to the
287 purchase of the property at two different times after we had a levy of the Bowser homestead, either upon the judgment that I represented or that and the Stearns judgment together. Mr. Bass told me and the sheriff, Munson, that if we put it up for sale he would bid it in. I think at one of those conversations Mr. Farrar had nothing to do with it and was not present, and afterwards Mr. Farrar was present at one or more conversations with Mr. Bass. At any rate, Wm. Bass did not, at either of these offers to sell, bid in the property, as we expected he would, according to his previous promise.

Ques. 6. State how it came that the levy on that property was released and the land sold came to be levied upon, and what connection Bass had to do with the change.

288 Ans. I don't think I can state that. I can state what I know was said about it. The Bowser homestead was encumbered to the extent of $5,000, which was probably ahead of the other judgments and a prior lien to both judgments, and that fact, with the further fact that the judgment which I represented did not waive appraisement, made it difficult to sell the Bowser homestead, and then Mr. Bass said, in substance, to me that he or we would endeavor to get the Stearns judgment out of the way first, as that waived appraisement, and that we would endeavor afterwards to find some way to make the judgment that I represented. I think he said, furthermore, in that connection, that he would try and find some property that could be levied on by the Stearns judg-
289 ment to advantage, and that he would try and induce Mr. Bowser to turn that out instead of the homestead property, and after that either the execution or *vendi.* in the Stearns case was released or returned—I don't know which now—unsatisfied upon Mr. Bass' recommendation, and a new levy was made on the Stearns judgment on said land in this country, which, if I recollect right, was suggested or pointed out by Mr. Bass.

Ques. 7. How did it come that these negotiations about these various levies were made with Mr. Bass?

Ans. I don't — that I can explain how we come to talk and negotiate about it at first, unless it was because he had a blanket mortgage, covering most of Mr. Bowser's real estate, for a large sum of money, and either he came to the sheriff and myself prior to

290 these offers for sale on my execution and [or] me to him; my best recollection is that he came to the sheriff and then to me first.

Cross-examination by attorney for defendants, Mr. COOMBS:

Ques. How many times, by your recollection, was that property offered for sale on the Stearns judgment?

Ans. I can't say positively that it was offered for sale on the Stearns judgment at all, but my best recollection is that it was offered once upon my judgment, or twice, and once upon my judgment and the Stearns judgment together, or at the same time, and it may have been offered for sale on the Stearns judgment alone and after I had connection with it.

Ques. Was the property sold at either of those offers; if
291 not, why not?

Ans. I think it was not sold upon either of those offers; I don't know why; my recollection is, there were no bids.

Ques. Would the fact that there was no waiver of appraisement on your execution prevent the sale to the highest bidder on the Stearns judgment?

Ans. I think not.

Ques. Do you not know that those lots were at the time encumbered by several tax deeds and one or more deeds of the sale of the property by the city for street or sewer assessments?

Ans. I couldn't say positively; my best recollection is, there were other encumbrances than those I have spoken of. I think there were some tax encumbrances.

292 Ques. Did not Mr. Bass give those encumbrances as a reason why he failed to bid on the property?

Ans. I don't now recollect that he did, although he might have done so.

Redirect by plaintiff:

Ques. Did you have any conversation with Mr. Bass after the levy of the Stearns judgment on the Milmine property in controversey? If so, state what he said to you in reference to the levy or sale of the same.

Ans. I had one or more conversations with Mr. Bass in which he spoke of the matter. He said in substance, as I recollect it, that he had got that execution levied upon a piece of land upon which there was a subsequent mortgage, then being foreclosed by Mr. Withers as attorney—my recollection is that he said it was the Milmine
293 mortgage—and that by that means he would get ahead of that mortgage, as the Stearns judgment was a prior lien. I think there were other conversations in which he made substantially the same statement, and at these conversations he congratulated himself on the stroke of policy by which he got ahead of the mortgage.

Ques. Please state what your recollection is of any conversations with Mr. Bass on that subject about the time or after the year of redemption had run out.

Ans. I had several talks with Mr. Bass in regard to making or

securing the claim I had against Bowser *et al.*, which was among the previous liens on the Bowser property, and which Mr. Bass had repeatedly promised me to secure in some shape, and which
294 was afterwards sold to him at a discount, and in these conversations Mr. Bass said one or more times that he thought he had cut out the Milmine mortgage by the purchase of the real estate on the Stearns judgment, and that Milmine and his attorney, Withers, hadn't discovered his purchase under the Stearns judgment until it was too late to help themselves, and he didn't know what they were going to do about it, nor what they could do about it.

ROBERT STRATTON.

CONRAD DANNENFELSER, being called, cautioned, and sworn, testified as follows:

Ques. State your name, age, occupation, and residence.

Ans. C. Dannenfelser; 64 years; St. Joe township; I am a farmer.

295 Ques. Were you acquainted with the fair cash values of the south half of section 27 and the fractional northwest quarter of section 34, in township 31 north, range 13 east, being in St. Joseph township, Allen county, Indiana, about 434 acres, in 1878 and now?

Ans. Yes; I am. It joins my land.

Ques. State what that was and is now.

Ans. It was $50 in 1878 and $30 now.

Ques. What has caused the decrease?

Ans. Destroying the timber. They took the good timber all off and left the tops lay. It looks awful.

C. DANNENFELSER.

Witness fee, 1 day and 14 miles.

HENRY YOUNG, being called, cautioned, and duly sworn, testified as follows:

Ques. State your name, age, occupation, and residence.

296 Ans. Henry Young; age, 42 years; St. Joe township, Allen county, Indiana.

Ques. Are you acquainted with the fair cash value of the following lands in St. Joseph township, Allen county Indiana, being the south half of sec. 27 and the fractional northwest quarter of sec. 34, town. 31 north, range 13 east, containing about 434 acres, in 1878?

Ans. Yes; I am.

Ques. State what that value was.

Ans. $50 per acre.

Ques. What is it worth now?

Ans. $30 per acre.

Ques. —.

Cross:

Ques. Do you know that there were tax deeds and outstanding incumbrances at that [the] time Mr. Bass bought the land?

297 Ans. Yes; there were tax titles outstanding against it.

Ques. Do you know whether there were any other tax encumbrances beside the tax deed; and, if so, how much?

Ans. I know there were other liens, but for how much I could not say.

HENRY YOUNG.

Witness fee, 1 day.

FREDERICK GERKE, being called, cautioned, and duly sworn, testified as follows:

Ques. State your name, age, occupation, and residence.

Ans. Frederick Gerke; 50 years; St. Joe township, Allen county; farmer; saw-mill.

Ques. Are you acquainted with the following lands in St. Joseph township, Allen county, Indiana, being the south half of section 27 and the fractional northwest quarter of section 34, township 31 north, range 13 east, about 434 acres, and the fair cash value
298 thereof in 1878 and now?

Ans. I was and am now.

Question. State what that value was.

Ans. 1878, $50 per acre; now, $30 per acre.

Ques. What has caused the decrease?

Ans. The destroying the timber.

F. GERKE.

Witness fee, 1 day and 14 miles.

ANTHONY KOHLMEYER, being called, cautioned, and duly sworn, testified as follows:

Ques. State your name, age, occupation, and residence.

Ans. Anthony F. Kohlmeyer; 52; St. Joe township, Allen Co.

Ques. Were you acquainted with the south half of section 27 and the fractional northwest quarter of section 34, township 31 north, range 13, St. Joseph township, Allen county, Indiana? What
299 was the fair cash value in 1878 and what is it now—about 434 acres?

Ans. In 1878, $50 per acre; now, $30.

Ques. What has caused the decrease?

Ans. The destroying the timber.

Cross-examination by attorney for defendant, Mr. COOMBS:

Ques. Do you know that at the time Mr. Bass bought the land that it was encumbered by tax deeds and other tax liens?

Ans. I held a tax certificate about a year and a half and sold it to Mr. Bass. I paid the taxes on it for two years.

Ques. Do you know of any other tax deeds or liens on the land.

Ans. I heard there were.

ANTON F. KOHLMEYER.

JOHN H. BASS, being duly sworn, testified as follows:

300 Ques. Please state your name and whether you are one of the defendants in this cause.

Ans. John H. Bass; I am.

Ques. Please state what amount in value of timber you have sold from the property described in the bill of complaint, as follows, being the property purchased by you upon an execution sale from J. C. Bowser, upon which the judgment of Stearns, Hutchins & Co. *vs.* Jacob C. Bowser *et al.*, referred to in J. C. Bowser's deposition, was a lien. Please describe each piece of land and the amount of timber sold off of each.

Ans. I have sold timber to the amount of about $8,600.00—that is, it has been contracted for, but not fully paid for. I suppose that the Gardner, Bliss & Co. judgment was a lien upon all of these
301 lands up to the time of its satisfaction, but there were older and prior liens, both in judgment and, I think, tax liens, prior to that. The bulk of the land was in St. Joe township from which the timber was sold.

J. H. BASS.

WILLIAM T. ABBOTT, being duly sworn, testified as follows:

Ques. State your name, residence, and occupation.

Ans. William T. Abbott; Washington township, Allen county; 57 years, and I am a farmer.

Ques. State whether or not you are acquainted with and know the value of the S. ½ S. ½ S. W. ¼, sec. 8, in Adams township; also the E. ½ N. W. ¼, sec. 17, and all that part of the W. ½ N. W. ¼, sec. 17, lying north of the Pittsburg, Fort Wayne and Chicago railway, containing in all about 121 acres.

Ans. Yes; I know the land and what I suppose the value is.

302 Ques. You will please state what that value is.

Ans. Well, I should put that land at $300 per acre. It is valuable land.

WM. T. ABBOTT.

Fees, 1 day.

The notary before whom the examination-in-chief was had being absent, it is agreed that the cross-examination may be had before George D. Crane, a notary public.

Ques. How long have you been engaged in the business of farming?

Ans. I have been living on a farm for about three years.

Ques. What business was you engaged in during your lifetime, previous to your going onto a farm?

Ans. I was a merchant many years; was auditor of Allen county four years, and have operated in real estate since that to some extent, in Adams county and other places.

303 Ques. What means have you had of becoming acquainted with farming land in the neighborhood of Fort Wayne?

Ans. I have had the usual experience of a man that has operated to some extent in farming lands and the information gained while in the auditor's office.

Ques. Have you, within the last five years, bought or sold any farming land in the vicinity of Fort Wayne; and, if so, what?

A. Yes; I bought the Shultz farm within five years, three miles north of the city. I have also sold it.

Ques. At what price did you buy and sell?

Ans. I paid a little over $40 an acre and sold for a little over $50 an acre.

Ques. Have you ever been over the land described in y ur examination-in-chief, so as to see every part of it; and,
304 if so, when?

Ans. I don't think I have ever been over every part of it. I have seen it at various times, but cannot tell the exact times.

Ques. Have you ever examined that land with a view of ascertaining the quality of the land or the timber thereon?

Ans. I have never dug any part of it up and I have never examined the timber particularly.

Ques. Have you ever seen any of this land only as you have passed along the road?

Ans. Only as I have been on some parts of it. I don't think I have seen any more of it than you could see from the roads.

Ques. How much of this land is swamp and how much dry land?

Ans. That I could not tell.

Ques. So far as you have seen this land, it is a heavy, clay soil, is it not?

305 Ans. I take it to be, the most of it, clay land.

Ques. What improvements were on the land in 1877 or 1879?

Ans. I don't know as I can answer that question. There was a little house on one side of the road, and a house and some buildings on the other side of the road. I took no buildings or improvements into account in my estimate of the value of the lands.

Ques. In 1878 was there any timber of value on the land; and, if so, what kind of timber?

Ans. I don't think I can state anything about the timber. I did not take the timber into account in making my estimate of the value of the land.

Ques. In 1878 what was the value of this land for farming purposes alone, without taking into consideration any other elements of value except its location near Fort Wayne?

Ans. Probably $75.00 or $80.00 per acre.

306 Ques. What, then, made you think the land was worth $300.00 per acre?

Ans. Its nearness to the city and its close proximity to what will be a railroad town.

Ques. What other use or purpose could this land be devoted to other than farming?

Ans. A large portion of it could be used for gardening and in lay-

ing off into lots to make a town of or an addition, and also for railroad purposes. I presume the railroad will want some of it.

Ques. Do you know that the railroad wants any of it?

Ans. Not from any personal knowledge.

WM. T. ABBOTT.

SIMON EDSALL, being duly sworn, testifies as follows:

Ques. State your name, age, residence, and occupation.

307 Ans. Simon Edsall; 74 years; Adams township, Allen county, Indiana, and I am a farmer.

Ques. State whether or not you are acquainted with and know the value of the S. ½ S. ½ S. W. ¼, sec. 8, in Adams township; also the E. ½ N. W. ¼, sec. 17, and all that part of the W. ½ N. W. ¼, sec. 17, lying north of the Pittsburg, Fort Wayne and Chicago railway, containing in all about 121 acres.

Ans. Yes; I ought to be somewhat acquainted with it. I have lived adjoining it 46 years.

Ques. You will please state what that value is.

Ans. My honest conviction would be that it is worth $200 per acre.

SIMON EDSALL.

Fees, 1 day.

The notary before whom the examination-in-chief was had being absent, it is agreed by the parties that the cross-examination of the witness may be had before George D. Crane, notary public.

308 Cross-examination:

Ques. Are you acquainted with all the lands referred to in your examination-in-chief?

Ans. I am.

Ques. What is the quality of the land?

Ans. It is pretty fair up.

Ques. Is it not rather poor, heavy clay land?

Ans. I say it is not heavy clay land. I say it is very fair land for upland. Of course, it is not sand, but it is pretty fair land.

Ques. How is the land timbered?

Ans. I don't think it is very good. You can't expect it to be very good timbered when the timber has all been cut off. It was well timbered once.

Ques. What improvements are there on the land?

Ans. There is a not very expensive frame house and barn; the house is one story; it covers a good deal of ground; it is

309 pretty well fenced. There is a very nice orchard, but not a large one, with very good fruit.

Ques. Is all that land fenced?

Ans. I guess it is all fenced in now.

Ques. What would that land be worth as farm land for agricultural purposes only?

Ans. I don't know as I could answer that exactly. I once said that land was worth $200 per acre, and I say so yet.

Ques. Do you mean to say that land is worth $200 per acre for farming purposes alone?

Ans. I don't say that, but I say it will fetch it.

Ques. You do not answer my question. I now ask what that land would be worth for mere farming purposes, without taking into consideration any other elements of value?

Ans. One hundred dollars per acre.

Ques. What, then, makes you think it worth $200 per acre
310 or worth more than for farming purposes?

Ans. I am offered $750 per acre for land right over the fence, and lands are improving in that vicinity.

Ques. By whom was you offered that price?

Ans. The railroad company, by their agent, I suppose, Mr. Slateper. I asked him $1,000, and he said he could not give but $750.

Ques. You have forty acres of land lying between the land spoken of in sec. 8 and the land recently purchased by or for the railroad company, have you not?

Ans. In the neighborhood of that quantity.

SIMON EDSALL.

CLARENCE W. EDSALL, being duly sworn, testified as follows:

—. State your name, age, residence, and occupation.

Ans. Clarence W. Edsall; Fort Wayne, Indiana; 34 years,
311 and I am — contracting business.

Ques. State whether or not you are acquainted with and know the value of the S. ½ of S. W. ¼ of sec. 8, in Adams township; also the E. ½ of N. W. ¼, sec. 17, and all that part of the W. ½ N. W. ¼, sec. 17, lying north of the Pittsburg, Fort Wayne and Chicago railway, containing in all about 121 acres.

Ans. I am acquainted with the land and know its value.

Ques. You will please state what that value is.

Ans. In my opinion, the cash value is $250 per acre.

CLARENCE W. EDSALL.

LEWIS S. MAPLES, being duly sworn, testifies as follows:

Ques. State your name, age, residence, and occupation.

Ans. Lewis S. Maples; fifty-ninth year; Maples, Indiana; merchant and farmer.

312 Ques. Were you acquainted with the value of property in and about Maples in the year 1878?

Ans. Yes.

Ques. State what was a fair cash value of the following property, in township No. 38, range 14: 1st. E. ½ S. E. ¼, sec. 32, about 80 acres, except that part of it in the plat of the town of Maples.

Ans. Well, that land, cut up as it is by railroad and town plat, is worth about $28 per acre, I think.

Ques. 2nd. That part of the W. ½ S. E. ½ that lies south of the town of Maples, and the S. W. ¼, sec. 32, and that part of the S. E. ¼ that lies north of the railroad, and the S. ½ S. ½ N. E. ¼, 34; in all, 239 acres.

Ans. About the same, $28 per acre.

Ques. What is the value of lot 9, in the original plat of Maples?

Ans. I suppose it is worth about $10.00.

313 Ques. What is the value of lot No. 13, same plat?

Ans. Lot No. 113 is worth $100.

Ques. Lot No. 20, in the town of Maples?

Ans. It is worth $10.00.

Ques. Lot No. 31, in the town of Maples?

Ans. It is worth $20.

Ques. Lot No. 35, in the town of Maples?

Ans. Worth $40.

Ques. Lot No. 36, in the town?

Ans. It is worth $5.00.

Ques. Blocks 1, 2, 3, 4, 5, and 6, in the 1st Addition to Maples?

Ans. I suppose, taking them all together as they stand, if they were clear'd off, they were worth about $1,000.00.

Ques. Lots 1, 2, 3, 4, 9, 11, 12, 13, 15, 16, 17, 18, in the 2nd Addition to Maples?

Ans. I suppose they are worth about $6 apiece.

Ques. What is the value of the E. ½ of S. W. ¼, sec. 33, 30, 14?

Ans. Well, I think I'll put that at $28.00 per acre.

Ques. What is the value of the S. ½ S. W. ¼ of sec. 30, 31, 15?

314 Ans. I don't know anything about property there.

Cross-examination by attorney for defendant:

Ques. You are interested in all these lands you have testified about?

Ans. Yes, sir; I have an interest in them.

Ques. At the time Bass bid in this property what interest, if any, did Jacob C. Bowser have in the town lots and other town property you have testified about?

Ans. Well, his interest in the whole property was one undivided half—that is, he claimed to own one-half (undivided) interest.

Ques. What interest had Bowser at that time in lot No. 10, in original plat of Maples?

Ans. Well, sir, he had no interest, no- a cent, for it had lawfully been deeded away by his attorney long before that.

315 Ques. What interest had he in lot 13, that you estimated at $100?

Ans. At the time Bass bought it I don't think he had any interest. Fred. Fry worked for Bird, Bowser and Maples, and they sold him lot 13 to pay for his labor. He took possession and lived there. When Bass bought it there was no deed executed or delivered.

Ques. What interest had Bowser in lot 31, in the town of Maples, at the time of sheriff's sale to Bass?

Ans. I don't think he had any; it had been sold years before.

Ques. Was not the record title in these lands in a very complicated condition, so that it was very difficult for a stranger to understand what interest Bowser had in them?

Ans. It was in a critical condition; it was hard for a
316 stranger to know what interest he had in the land.

Ques. What interest did Bowser originally have in all these lands?

Ans. He owned the undivided one-fourth part of all the lands in sec. 32, the undivided $\frac{1}{12}$ of 51 acres in 33, and the undivided one-fourth part of 54.56 acres in sec. 5, Madison township, and the one-fourth (und.) in all the rest.

Ques. What, in your opinion, was the cash value of the undivided interest of Jacob C. Bowser in these fractional pieces of land at the time they were sold by the sheriff to John H. Bass?

Ans. I would not want to pay more than $15.00 an acre.

L. S. MAPLES.

NEIL MCLACHLAN, being duly sworn, testifies as follows:

317 Ques. 1. State your name, age, residence, and occupation.

Ans. Neil McLachlan; sixty-four years; Fort Wayne, Indiana, and I am a boiler-maker by trade. I am not in business now.

Ques. 2. Are you acquainted with the value of the property known as the Bowser foundry property, just north of the canal?

Ans. Not any farther than the amount we paid for it in 1876.

Ques. 3. You may state, if you can, if you knew what it was worth in 1876.

Ans. I think so.

Ques. 4. What, in your opinion, was it worth?

Ans. It was worth sixty thousand dollars—that is, without the stock.

Ques. 5. You say that you bought it. State whether or not you examined it to see what it was worth.

Ans. Yes.

Ques. 6. How familiar were you with the property at the
318 time you bought it?

Ans. I had been considerably around the place.

Cross-examination by attorney for defendants, Mr. COOMBS:

Ques. What part of the property did you purchase and what did you pay for it and at what time?

Ans. I and C. L. Olds purchased one undivided half of the whole real estate and machinery and patterns about June, 1876, for $30,000.

Ques. Was that paid in cash or on time?

Ans. It was paid part in cash and part on time.

Ques. Did you consider that a fair value at the time?

Ans. Yes.

NEIL MCLACHLAN.

CHARLES L. OLDS, being duly sworn, testifies as follows:

319 Ques. State your name, age, residence, and occupation.

Ans. Charles L. Olds; twenty-nine years; Fort Wayne, Indiana, and I am a manufacturer.

Ques. Do you know the Bowser foundry property in this city, just north of the canal?

Ans. Yes.

Ques. State what the description of that property is.

Ans. Lots 17 and 18, old plat, and 565, 566, and 567, Hanna's Addition to the city of Fort Wayne.

Ques. State whether you knew the value of that property in 1876.

Ans. No; I didn't know the value of it at that time.

Ques. What did you have to do with the property at that time?

Ans. Mr. McLachlan and myself bought one undivided one-half interest in that property about June 14, 1876.

Ques. Of whom did you buy it?

Ans. Of J. C. Bowser.

320 Ques. What did you or what were you to pay Bowser for it?

Ans. We were to pay Bowser $30,000 for his one-half interest, part in cash; as near as I can recollect about $11,000 cash; assumed some encumbrances, and time on the balance.

Ques. When did you have any negotiations with Mr. John H. Bass in regard to this property?

Ans. We purchases of John H. Bass some time in the spring of 1878.

Ques. What did you buy and what did you give for it?

Ans. We bought the same half over again from him. We bought of Bass on the same terms that we bought of Bowser, less previous payments.

Ques. Can you state about how much there was still coming to Bowser?

Ans. I think about $14,000 outside of the encumbrances we assumed.

321 Ques. How did it come that Mr. Bass gave you credit on your purchase from him what you had paid Bowser before that?

Ans. I suppose he wished to dispose of the property and called upon us as the most available purchasers, and was kind enough not to want us to throw away what we had paid on it.

Ques. Has that amount been paid to Mr. Bass?

Ans. Not in full.

Ques. State whether or not Mr. Bass bought it on an execution sale after you bought it of Bowser.

Ans. He bought it on a foreclosure of a mortgage that was an encumbrance when we bought of Bowser.

Ques. Was that one of the encumbrances that you were to pay part?

Ans. Yes; it was.

322 Ques. Was there any arrangement between you and Mr. Bass by which that sale was to be made on the foreclosure?

Ans. There may have been some general talk, but as to a written agreement there was none.

Ques. Was there any verbal agreement by which he was to be allowed to buy it in?

Ans. Well, as I recollect, it was understood that if he should secure a title to the property we should have the right of purchasing from him at a fair valuation.

Ques. Was that the arrangement that was carried out in 1878, when you bought of him?

Ans. Yes; practically.

Cross-examination by attorney for defendant-, Mr. COOMBS:

Ques. Was the contract for the purchase of the property between you and Mr. McLachlan and Mr. Bass reduced to writing?

Ans. Yes. sir.

323 *Ans. Yes, sir.*

Redirect examination — attorney for plaintiffs, T. E. ELLISON:

Ques. State whether or not you were not going to pay off this encumbrance upon which the property was sold, but because of these negotiations with Mr. Bass you allowed it to go to sale.

Ans. As I recollect now, we had about made up our minds to sue Bowser for what we had paid him and for the restitution of our notes, as we found we were deceived in regard to the title of the property and encumbrances upon it.

Ques. Was it not because of these negotiations that you did not do that, but let it go to sale?

Ans. Not entirely, as we knew we could take this steep [step] at any time in the future.

Ques. Does Mr. Bass still own the other half purchased at

324 that sale?

Ans. Yes.

Recross-examination by attorney for defendant:

Ques. Look at the paper I now present to you and say whether or not it is the original contract of John H. Bass, Neil McLachlan, and yourself for the purchase of the foundry property you testified about yesterday.

Ans. Yes.

A copy of which contract is hereto attached and marked Exhibit "A."

CHARLES L. OLDS.

JACOB C. BOWSER, being duly sworn, testifies as follows:

Ques. State your name, age, residence, and whether you were a member of the firm of J. C. Bowser & Company.

325 Ans. J. C. Bowser; past seventy-five; Fort Wayne; I was.

Ques. State whether you recollect of a judgment being taken in the Allen circuit court against Reuben Gardner, Andrew C. Gardner, Henry Blish, as principals, Jacob C. Bowser, Joseph R. Prentiss, and Daniel M. Falls, as sureties, in favor of Herman E. Stearns, Charles F. Stearns, and Moses Oppenheimer for something over $2,000 about 1873.

Ans. I recollect such a judgment taken against us about that time in those men's favor, but I don't know which court it was in.

Ques. State what you know, if anything, of payments being made on said judgment of Gardner, Blish & Co. I place now in your hands a copy of four receipts attached to the judgment dockets in said cause. Please examine said receipts.

326 Mr. Bass' counsel objects to the witness'es refreshing his memory in those receipts unless they are in his handwriting.

Ans. Well, I just say I know there are three or four payments, for I have seen them, but I think we made them. I may be mistaken.

Ques. Please state about what amount of payments were made, as near as you can recollect, by your firm or any member thereof or the principal judgment defendants.

Ans. I think in the neighborhood of $400. I may be mistaken, it was so long ago.

Ques. I will place in your hands the Judgment Docket No. 8 of the Allen circuit court and ask you to examine page 45 of said record, and the receipts attached thereto, and also the endorsements on said receipts, and ask you to state whether any of the writings endorsed on said receipts are in your handwriting.

327 Ans. That on the back of one of them is in my handwriting—Stearns & Co. receipt, amounting in toto to $500, paid on judgments.

Ques. State, from the examination of said memorandum, whether your memory is refreshed as to the payments made on said judgment, and the amount.

Ans. It is. I might as well say the amount of the receipts is correct. I now attach a copy of the four receipts, the same being attached to the record of said judgment, on one of which I made the endorsement set forth above, and make said copies a part of my deposition, marked Exhibit "A."

Ques. Are you acquainted with the handwriting of H. E. and C. F. Stearns & Co.?

Ans. I am not.

Ques. Then you may state, in view of said receipts and
328 exhibits and your recollection of said payment, whether or not the amounts in said receipts are the correct amounts paid on said judgment at the times in said receipts stated.

Ans. I think, to the best of my recollection of what I know about it, they are.

J. C. BOWSER.

GEORGE D. CRANE, being duly sworn, testifies as follows:

Ques. State your name, age, residence, and occupation, and whether you are acquainted with the records of the Allen superior court, and what you know, if anything, of the paper now placed in your hands,

being a correct copy of the records of the proceedings of said court in the case of George Milmine against Jacob C. Bowser *et al.*

Ans. George D. Crane; age 41 years; Fort Wayne, Indiana;
329 attorney-at-law. I am quite familiar with the record of the Allen superior court. The paper which I now have in my hands is a transcript of the proceedings had by said court in said cause and the pleadings filed therein, made by me from the order books of said court and the papers filed in said cause, which transcript I attach to this my deposition, marked Exhibit "B."

The defendant Bass objects to the foregoing question and the answer thereto.

Cross-examination by attorney for defendant, Mr. COOMBS:

Ques. Did you ever act as clerk or deputy clerk of the superior court of Allen county?

Ans. No.

G. D. CRANE.

J. D. MCHENRY, first being duly sworn, testified as follows:

330 Direct examination by Mr. ELLISON:

Q. State your name.

A. J. D. McHenry.

Q. You may state your age, residence, and occupation.

A. I am forty-eight; a physician; residence at Maples, in this county.

Q. Are you acquainted with the value of property in and about the town of Maples, in this county?

A. Well, as much as anything else of an ordinary kind. I know, perhaps, what it is worth; yes, sir.

Q. What is the value of the Bowser and Bass land in and about Maples?

A. I should put it all about the same.

Q. In section thirty-two and thirty-three, in the southwest quarter of thirty-two and the southeast quarter of thirty-three, except that occupied by the town plat of Maples, and the south half of
331 the south half of the northwest quarter of thirty-two and the east half of the southwest quarter of thirty-three, about eighty acres of it lays about half a mile east of town, and in all about 330 acres.

A. I would put it at thirty dollars an acre, the way it lays.

Q. What is the value of the following lots in the original plat of Maples—lot nine?

A. Well, I shall have to, perhaps, modify my former statement and put the value at twenty-five dollars an acre.

Q. What is the value of lot ten?

A. That is worth $150, with the improvements.

Q. Lot 13, what is the value?

A. The same—one hundred and fifty.

Q. And twenty?

A. Well, that is worth twenty-five.

Q. And thirty-one?

A. The same—twenty-five dollars.

332 Q. Number thirty-five?

A. It is not worth so much; it is —, perhaps, twenty dollars.

Q. Number thirty-six?

A. It is worth ten dollars; is about all.

Q. And the following, in the First Addition, in the town of Maples—lots one, two, three, four, five, and six?

A. Those are in blocks. Well, I should put that row at two thousand dollars, with the improvements.

Q. What special improvements are there on that lot?

A. There are seven dwelling-houses, stables, and wells. Some are in good repair—the one that Mr. Maples is living on—and the others are all fair houses—frame houses.

Q. What is the value of the following lots, in the Second Addition to Maples—lots one, two, three, four, nine, eleven, twelve, thirteen, fifteen, sixteen, seventeen, and eighteen?

333 A. They are all vacant lots except on; they are all vacant but number nine. The vacant lots are worth ten dollars apiece; they are not fenced.

Q. Number nine is worth what?

A. It is worth seventy-five dollars with the house and improvements.

Cross-examination by Mr. BELL:

Q. Doctor, have you been engaged in the real estate business yourself?

A. No, sir; I have not, except to buy and pay for a small farm I live on.

Q. What sales do you know of in that vicinity recently?

A. Well, one only; a mile and [or] a mile and a half from my place. Mr. John Matthews sold a farm.

Q. Do you know what he sold for?

334 A. I think forty-seven and a half — an acre.

Q. It was a tolerably well improved farm?

A. Yes, sir; a tolerable fair barn and house.

Q. And drained pretty well?

A. I couldn't say so. There had been some attempt at drainage, but not very thorough.

Q. Do you know anything about any other sales?

A. Well, not recently.

Q. Do you know that the title to all this property down there is in doubt?

A. Well, I think it is very much like the baker's bread—"mixed up."

Q. And for that reason buyers would be very scary about purchasing?

A. Yes, sir.

Q. You fix this value upon the theory that the title could be made good?

A. No, sir. Mr. Bell, I know what these lots have brought and sold for before.

335 Q. Assuming that the title would be good or could be made good?

A. I placed the value upon the property as it exists—mixed up as to title; that, of course, depreciates it in value.

Q. The title is and has been very uncertain?

A. It was difficult to get a title of any kind.

Q. And it would have to be some one that had faith in getting a good title before he would buy at all?

A. I know that. I placed it at about half the price it was selling before. I bought three several town lots in Maples and I paid fifty dollars for two and sixty dollars for one.

Q. You couldn't give a record title of that sale to any one?

A. Yes, sir; I could give a title of sale.

Q. But whoever bought it might have difficulty with it or a lawsuit?

A. (No answer.)

336 Q. What is the size of the town of Maples?

A. The number of people is about one hundred and fifty. I am guessing. I don't know positively.

Q. How far is it from the city of Fort Wayne?

A. About ten miles; about twelve by the road.

Q. There is plenty room for it to grow.

A. Yes, sir; I would say it is not any larger than New York city was one day.

Q. Would you regard the lots as worth any more than farm land?

A. I think very little, if any.

And this was all the evidence given by this witness.

JOHN H. BASS, being duly sworn to tell the truth, &c., testified as follows:

Direct examination by Mr. BELL:

337 Q. You may state your name.

A. John H. Bass.

Q. You are the defendant in this action?

A. Yes, sir.

Q. State, if you please, Mr. Bass, what, if anything, you had to do with the release of the levy execution on Stearns' judgment on lots 116 and 117 and the subsequent levy upon the lots finally sold on that execution.

A. I had nothing whatever.

Q. What arrangement, contract, or agreement did you make with the execution plaintiffs, or with their attorneys, or with any person representing them or either of them, with reference to such release before the levy upon the property finally sold?

A. I had none whatever.

Q. State what directions you gave to any person to have a levy made upon the land finally sold upon the execution.

A. I never gave any directions, for the reason that I didn't
338 feel that I had any right to.

Q. What conversation did you ever have, if any, before the levy and sale of the premises finally sold, with Robert Stratton about the matter?

A. I had some conversation with Mr. Stratton regarding the sale of this homestead property, and perhaps said to him at one time that I would bid upon that property when it was levied upon by this Stearns execution and perhaps one held by myself. At that time I did intend to bid upon it; but, upon subsequent investigation, I ascertained that there were prior liens on these judgments, which I was concerned in at the time, to such an extent that I felt it pretty unsafe to bid upon both the liens then existing. I consequently declined to bid upon it at all.

Q. What, if anything, did you say to Mr. Stratton about your having procured the levy to be made upon the lands finally
339 sold?

A. I don't think I ever made any such statement, that I had procurred it.

Q. Did you ever procure anybody, or direct anybody, or suggest to anybody that the levy be there made?

A. I don't remember of suggesting that that particular property should be levied upon. I may have suggested that that or other pieces of property that were levied upon by judgments which were prior to my mortgage—that I would have to bid what I could safely bid upon them in order to get the judgment out of the way.

Q. What was your policy and intention in regard to all the property of Bowser against which there were judgment liens?

A. My intention was to bid all that I was willing to pay for any property that was levied upon by a prior execution to the
340 mortgage that I had and until they were cleaned out, or either get the property which I thought was a lien at a fair valuation or let somebody else have it. It was only my desire or wish to bid any of it in if it would bring its full value.

Q. What, if anything did you ever say to Robert Stratton to the effect that you were glad you had got a title to this land or in the way of exultation that others hadn't found it out?

A. I don't remember any such conversation as that, although it it is possible I may *I* have stated that I had obtained a deed to the property. I may have laughed at the idea of them letting the property go without redemption. Of course I expected it to be redeemed.

Q. What, if anything, did you ever do to conceal the fact that this execution had been levied upon the property and it was
341 offered for sale, and had been sold prior to the time of the expiration of the period of redemption?

A. Nothing whatever.

Q. Did you ever suggest to any person that any concealment be made or any course be resorted to to accomplish such result?

A. I think not.

Q. Mr. H., I believe, was all the while a resident attorney and resided in Fort Wayne?

A. I so understand.

Q. Do you know how old an established paper the Fort Wayne Sentinel is?

A. Do I?

Q. Yes, sir.

A. I don't positively; it has been a paper over thirty-one years that I know of. It was published when I came here, I believe, by Mr. Tigar.

Q. Is it not now and was it not at the time this sale was advertised in it—was it not the leading paper published in the
342 city of Fort Wayne?

A. I think it is and was.

Q. Did it not at that time and had it not long before and does it not yet contain the great majority of legal publications made in this county?

A. I think it does; nearly all of them.

Q. How was it at the time and prior to that time?

A. At that time and prior to that time for a long time that was the case.

Q. Isn't it the Fort Wayne Weekly Sentinel which has almost exclusively for a great many years contained the delinquent tax-list published in this county?

A. I think it has.

Q. Mr. Bass, something has been said in the testimony about the value of certain lots in Maples. You may state whether or not it is a fact that the title to all that property is very much mixed up and uncertain.

A. Very much, indeed.

343 Q. You may state, even in the event that the title is good, what, if anything, those lots are worth more than ordinary farming land.

A. I do not consider them worth any more. I would much prefer to have them that way and farm them. I bought several of those lots at a small price, knowing at the time that the lots had been sold to other parties and some houses built upon them when they were intended to be properly conveyed at the time, but in fact, as a matter of record, were not. My object in buying them was to let them refund me the money that I had paid out and then give them a perfect title to that property, which I now intend to do.

Cross-examination by Mr. ELLISON:

Q. These publications were made in the Weekly Sentinel, were they not?

A. I think they were; yes, sir.

344 Q. Don't you know the Weekly Sentinel has but a small circulation in the city?

A. I cannot say as to the circulation.

Q. Is not the daily about the only paper taken in the city?

A. No, sir; I know the weekly is taken; I take the weekly myself. I take it more for that purpose than anything else.

Q. Do you say you have no recollection of talking with Mr. Stratton about this matter.

A. No, sir; I didn't say that. I said I had talked with him.

Q. To release this execution?

A. No, sir; I don't remember any conversation regarding that.

Q. Do you recollect that he and Mr. Farrar were moving together in this matter?

A. I didn't. I know at one time, about the time of the sale of this homestead property here, that Mr. Farrar was here, and, I believe, I saw the two together, but I don't know how closely their arrangements were.

345 Q. Did you not tell Mr. Stratton that you would have that Stearns matter got out of the way, then you would make some arrangement about which his matter could be satisfied.

A. No, sir; I didn't for the simple — I had now [no] power in the matter.

Q. Were you not trying to manage the disposal of the Bowser property in such a way as to save yourself from the indemnity mortgage you were on?

A. What do you refer to?

Q. The big mortgage.

A. Yes, sir; I was endeavoring to have my judgment prior to that mortgage got out of the way by sales of the property.

Q. Were you not endeavoring to have execution- so distributed around over different pieces of Bowser's property as to cover them all?

A. I had no control of the executions. I only bid upon the property when it was offered for sale.

346 Q. Did you not negotiate with different landholders to have them so placed as to buy the Bowser property in?

A. No, sir. I was very much in hopes that it would sell for enough to pay all the old judgments and let me get a little on my mortgage on some of that property, which I have not got and have but little hopes of ever getting.

EXHIBIT "A." Attached to the Deposition of Charles L. Olds.

Whereas Jacob C. Bowser, Joseph R. Prentiss, and Daniel M. Falls, partners under the firm name of J. C. Bowser & Co., were the owners of lots 17 and 18, on the original plat of the city of Fort Wayne, and lots 565, 566, and 567, in Hanna's Addition to said city, with the foundry, machine, boiler, and other shops thereon and the machines, tools, implements, and other personal property appertaining thereto, the said Bowser owning the one half and the said Prentiss and Fall the other half thereof; which property was greatly encumbered by mortgage and other liens thereon contracted by the said J. C. Bowser & Co.; and whereas the said J. C. Bowser, on the 14th day of June, 1876, sold and conveyed his half of all of the said property to the said Neil McLachlan and Charles

L. Olds, who agreed to pay and discharge the liens on said property to the amount of $8,000.00, and also gave the said Bowser their seven promissory notes for the sum of two thousand dollars ($2,000.00) each, payable in 1, 2, 3, 4, 5, 6, and 7 years after the date thereof, all secured by a mortgage on the property thus conveyed to them; and whereas the said John H. Bass had indorsed notes for the said J. C. Bowser & Co. to the amount of about $22,000.00, for which he is still liable, and the said Jacob C. Bowser, to secure the said Bass
348 as such indorser, indorsed the said seven notes of said McLachlan and Olds and delivered them to the Fort Wayne National Bank in trust for the said John H. Bass; and whereas, the said J. C. Bowser & Co. having failed to pay and discharge the liens on said property, one of said mortgages covering all of said property, both real and personal, was foreclosed by a decree of the Allen circuit court, upon which decree all of said property was on the 28th day of April, 1877, sold by the sheriff of Allen county to the said John H. Bass, who thereupon received the sheriff's certificate of the sale of said lots, which will entitle him to a sheriff's deed therefor if said lots are not redeemed within one year from the date of said sale, subject, however, to the lien of prior mortgages to a large amount:

Now, therefore, to define and protect the interest of the said several parties in and to said property, it is mutually agreed by
349 and between the said John H. Bass, of the first part, and the said Neil McLachlan and Charles L. Olds, of the second part, as follows: The said party of the second part are to assume and pay one note executed by the said J. C. Bowser & Co. to Caroline Nuttman for the sum of $4,000.00, and another note of the said J. C. Bowser and Co., payable to one Anne C. Ketchum for the sum of $4,000, both of which notes are secured by mortgages on said lots, together with ten per cent. interest on each of said notes from the 14th day of June, 1876, and secure the payment thereof to the satisfaction of said Bass; and the said John H. Bass, at the expiration of one year from the date of said sheriff's sale, in case said lots should not be redeemed, is to convey by a good and sufficient quitclaim deed the one undivided fourth part of all of said lots, machines, tools, patterns, and other property so purchased at
350 said sheriff's sale to the said Neil McLachlan, and in like manner convey the one-fourth part thereof to the said Charles L. Olds, and the said McLachlan and Olds are to quitclaim to the said John H. Bass all their interest in and to the undivided half — lots, machines, tools, and patterns, including the steam-engine now used on said premises and now owned by said McLachlan and Olds.

The mortgage on said premises executed by the said McLachlan and Olds to secure the said seven notes so given to the said Bowser is to be preserved and kept alive until the expiration of the year from the date of said sheriff's sale, as security for the payment of said seven notes for the sum of $2,000.00 each, in case said lots should be redeemed from said sheriff's sale; but upon the conveyance of the said property by the said Bass to the said McLachlan and
351 Olds as aforesaid said seven notes are to be surrendered to the makers thereof and said mortgage is to be cancelled and satisfied of record.

And the said Neil McLachlan is to execute his notes to the said John H. Bass for the sum of $4,500.00, with the accrued interest thereon, less the amount of any set-off he may have thereto against the said J. C. Bowser and John H. Bass or any payments made thereon by him, the said new notes to correspond as to time of payment and rate of interest with said old notes and to be of equal amounts; and in like manner the said Charles L. Olds is to execute his notes to the said John H. Bass for the sum of $9,500 and accrued interest of that amount of said old notes, less the amount of any set-off he may have thereto against the said J. C. Bowser and John H. Bass or any payment made thereon by him, the said
352 new notes to be of equal amounts and to correspond as to time of payment and rates of interest with said old notes, all of said new notes to be secured by the separate mortgages of the said McLachlan and Olds on their respective interests in the property so conveyed by Bass to them, it being expressly understood that said new notes are to be renewals of said old notes and subject to any set-offs to which said old notes would have been liable.

And it is further agreed that said set-offs are to be adjusted and applied upon the notes for $2,000.00, to become due on the 14th day of June, 1877, and the said McLachlan and Olds are to pay whatever balance may then be due of the said note and accrued interest on the remainder of said seven notes; after deducting said set-offs. Witness our hands and seals this 5th day of June, 1877.

(Signed) J. H. BASS.
NEIL McLACHLAN.
C. L. OLDS.

353 EXHIBIT "A." Attached to the Deposition of Jacob C. Bowser.

Copies of Receipts Attached to Judgment Docket 8, Page 45, Judgment Stearns et al. vs. Gardner et al.

Received of Gardner, Blish & Co. three hundred & fifty-four $\frac{93}{100}$ dolls., to be applied on judgment held by us against them & J. C. Bowser & Co. in Allen Co. court.

$354.93. Peru, Dec. 31, '73.

H. E. & C. F. STERNE & CO.

Rec'd of Gardner, Blish & Co. one hundred & forty-five $\frac{7}{100}$ dolls., to be applied the same as above.

$145.07. Peru, Jan'y 7, '74.

H. E. & C. F. STERNE & CO.

[On margin:] Stearns & Co., 2 re'pts, amounting in total to $500, paid on judgment.

Rec'd of Messrs. Gardner, Blish & Co. interest in full to May 1st, 1874, on judgment rendered against them & J. C. Bowser & Co. in the Allen county court.

Peru, May 11th, 1874.

H. E. & C. F. STERNE & CO.

No. —. PERU, IND., *July 20th*, 1876.

Received of Mess. Gardner, Blish & Co. — dollars for in-
354 terest to January 1st, '77, on judgment rendered in Allen Co. court against Gardner, Blish & Co. & J. C. Bowser & Co., for which accept our thanks. Awaiting your further commands, we are,

Yours truly, H. E. & C. F. STERNE & CO.
J. L. A.

EXHIBIT "B." Attached to Deposition of Geo. D. Crane.

Pleas before the Honorable Robert Lowry, judge of the superior court of Allen county, at a term of said court held at the court-house, in the city of Fort Wayne, in Allen county, State of Indiana, commencing on the second Monday of January, A. D. 1879.

GEORGE MILMINE
vs.

JACOB C. BOWSER, DELILA BOWSER, JOHN H. BASS, WILLIAM F. MEREDITH, Daniel F. Noys, William C. Wines, The Huron Iron Company, Thomas Swank, Christian Swank, Joseph M. Sharp, Jeremiah Kerby, Eastern Kentucky Railway, John Herron, Jacob
355 Weis, Frederick Hoffer, Henry Chandler, Hiram Campbell, John W. Campbell, Joseph H. Campbell, Marcus Hanna, Robert Rhodes, Henry Diston, William C. Allison, Thomas E. Allison, Thomas R. Kitt, Administrator of the Estate of Frederick Bittinger, Deceased; Charles Huston, Charles Penrose, First National Bank of Philadelphia, Minerva McMahon, Horace G. Cleveland, Peter M. Hitchcock, Aaron M. Wilcox, Martin Bunnell, Joseph H. Brown, Richard Brown, John O. Brown, John McManaman, Mary O'Connel, Executrix of the Estate of Daniel O'Connell, Deceased; Frederick Hartmeyer, Cleveland City Forge and Iron Company, Henry A. Rogers, James Ohlen, Henry B. Tillinghast, James Munroe, Oliver Tillinghast, Edwin K. Wood, Giles Gilbert, Basil Hendricks, Lucien J. Knowles, The Fort Wayne National Bank, James T. Rhodes, Hamilton Deiston, Albert A. Deiston, Frederick J. Hayden, Frederick Kanning, Hester A. Woods, Martin H. Miller, Hamilton Bank, Martin H. Mil-
356 ler, Administrator of the Estate of George Miller, Deceased; Noah Clem.

Be it remembered that heretofore, to wit, on the 5th day of June, 1878, the said plaintiff, by his attorney, W. H. Witchers, Esq., filed in the office of the clerk of the superior court his complaint in this behalf in the words and figures following, to wit:

STATE OF INDIANA, } *ss:*
Allen County, }

In the Superior Court of Allen County. April Term, 1878.

George Milmine, the plaintiff in this action, complains of Jacob

C. Bowser, Delila Bowser, John H. Bass, William Meredith, Daniel F. Noys, William D. Wines, The Huron Iron Company, Thomas Swank, Christian Swank, The Fort Wayne National Bank, Joseph M. Sharp, Jeremiah Kerby, The Eastern Kentucky Railway, John Herron, Jacob Weis, Frederick Hoffer, Henry Chandler, Hiram Campbell, John M. Campbell, Joseph H. Campbell, Marcus Hanna, Robert A. Rhodes, James T. Rhodes, Henry Deiston, Hamilton Deiston, Albert H. Deiston, William C. Allison, Thomas E.
357 Allison, John R. Kitt, administrator of the estate of Frederick Bittinger, deceased; Frederick J. Hayden, Frederick Kanning, Hester A. Woods, Charles Huston, Charles Penrose, First National Bank of Philadelphia, Minerva McMahon, Horace G. Cleveland, Peter M. Hitchcock, Aaron M. Wilcox, Martyn Bonnell, Joseph H. Brown, Richard Brown, John O. Brown, John McManaman, Mary O'Connell, executrix of the estate of Daniel O'Connell, deceased; Martin H. Miller, Frederick Hartmeyer, Cleveland City Forge and Iron Company, Hamilton Bank, Henry A. Rogers, Martin H. Miller, administrator of the estate of George Miller, deceased; James Ohlen, Henry B. Tillinghast, James Munroe, Oliver B. Tillinghast, Edwin K. Wood, Giles Gilbert, Basil Hendricks, Lucien J. Knowles, and Noah Clem, defendants in this action, and says that on the first day of June, 1875, the defendants Jacob C. Bowser and Delila Bowser executed and delivered to one David Smith, then in life, but since deceased, a
358 mortgage, which is filed herewith and made a part of this complaint, conveying to him the real estate therein described, as security for the payment of a debt evidenced by a note, a copy of which is also filed herewith and made a part of this complaint, executed by the defendant, Jacob C. Bowser, by the name and signature of J. C. Bowser, dated June 1, 1875, for the sum of four thousand eight hundred and forty-four $\frac{19}{100}$ dollars ($4,844.19), and payable to the order of the said David Smith, at the Hamilton Bank, in said county, a bank within the State of Indiana, three years after the date thereof, with interest thereon at the rate of ten per centum per annum, payable annually from the date of said note until the same should be paid, and without any relief whatever from valuation and appraisement laws; that afterwards, to wit, on the — day of ——, 187–, the said David Smith departed this life, testate, the
359 holder and owner of said note; and afterwards, to wit, on the — day of ——, 187–, one William H. Smith and Sarah B. Smith were duly appointed and are now the only and sole executors of his estate; that afterwards, to wit, on the first day of August, 1877, by their endorsement in writing thereon, which is filed herewith and made a part of this complaint, the said William H. Smith and Sarah B. Smith, executors of the estate of David Smith, deceased, as such executors transferred and assigned said mortgage to the plaintiff, and that afterwards, to wit, on the day and year last aforesaid, by their writing thereon endorsed, a copy of which is also filed herewith and made a part hereof, the said William H. H. Smith and Sarah B. Smith, as such executors of the estate of

David B. Smith, deceased, transferred, assigned, and endorsed said note to the plaintiff.

And plaintiff avers that said mortgage was duly presented
360 for record and recorded among the records of mortgages in Mortgage Record No. 27, page 429, in Allen county, Indiana, the county in which — therein described are situate, on the first day of June, 1875; and that afterwards, to wit, on the 4th day of August, 1877, the aforesaid assignment of said mortgage was presented for record and duly recorded on the margin of the record thereof; and the plaintiff further avers that the defendants, John H. Bass, William F. Meredith, Daniel F. Noyes, William D. Wines, The Huron Iron Company, Thomas Swank, Christian Swank, The Fort Wayne National Bank, Joseph M. Sharp, Jeremiah Kirby, Eastern Kentucky Railway, John Herron, Jacob Weis, Frederick Hoffer, Henry Chandler, Hiram Campbell, John W. Campbell, Joseph H. Campbell, Marcus Hanna, Robert H. Rhodes, Henry Deiston, Hamilton Deiston, Albert H. Deiston, William C. Allison, Thomas E. Allison, John R. Kitt, administrator of the estate of Henry Bittenger, deceased; Frederick J. Hayden, Frederick Kanning, Hester A.
361 Wood, Charles Huston, Charles Penrose, The First National Bank of Philadelphia, Minerva McMahon, Horace G. Cleveland, Peter M. Hitchcock, Aaron M. Wilcox, Martyn Bonnell, Joseph H. Brown, Richard Brown, John O. Brown, John McManaman, Mary O'Connell, executrix of the estate of Daniel O'Connell, deceased; Martin H. Miller, Frederick Hartmeyer, Cleveland City Forge and Iron Company, Henry A. Rogers, Hamilton Bank, Martin H. Miller, administrator of the estate of George Miller, deceased; James Ohlen, Henry B. Tittinghast, Edwin K. Wood, Giles Gilbert, Basil Hendricks, Lucien J. Knowles, and Noah Clem, claim to have and hold liens upon the premises described in the said mortgage, but the plaintiff avers that said liens and each of them and all the interest and claim that the said last-named defendants and each of them have or claim to have and hold in, to, or upon said premises or any part
362 thereof ar- junior and inferior and subject to the prior and superior claim of the plaintiff thereon by reason of the assignment to him of the said note and mortgage as aforesaid; and the plaintiff further avers that the said Jacob C. Bowser did not pay said note when the same became due, upon presentation at the place where it was made payable, nor the interest thereon nor any part of either thereof, and that the said note, together with a large amount of interest accrued thereon, is due and remains wholly unpaid.

And the plaintiff further avers that by reason of a mistake and oversight on the part of the scrivener who drew up and wrote the said mortgage in reciting and describing said note the same, by reason of said mistake and oversight, was made as payable for the sum of four thousand eight hundred and eighty-four and
363 $\frac{19}{100}$ dollars, instead of the sum of four thousand eight hundred and forty-four and $\frac{19}{100}$ dollars ($4,844.19), the true amount thereof and the sum for which said — was given and made payable.

Wherefore the plaintiff prays that the description of said note in

the said mortgage be reformed and that the said mortgage be so altered and corrected as to read and recite the said note as made and payable in the sum of four thousand eight hundred and forty-four and $\frac{19}{100}$ dollars ($4,844.19), instead of the sum of four thousand eight hundred and eighty-four and $\frac{19}{100}$ dollars, as erroneously, by the mistake and oversight aforesaid the same was made to read; that he may have judgment against the said Jacob C. Bowser for the sum of seven thousand dollars ($7,000.00) and the foreclosure of said mortgage against all of said defendants, and the sale of the real estate described therein, or so much thereof as may be
364 necessary to pay his said debt, and for other proper relief.

By W. H. WITHERS, *His Att'y.*

This indenture witnesseth: That Jacob C. Bowser and Delila Bowser, his wife, of Allen county, in the State of Indiana, mortgage and warrant to David Smith, of Lucas county, in the State of Ohio, the following real estate in Allen county, in the State of Indiana, to wit: The south half ($\frac{1}{2}$) of the south half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) of section eight (8), town. thirty (30) north, range thirteen (13) east; also the east half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) of section 17, town. thirty (30) north, range thirteen (13) east, except ten (10) acres in the northeast corner and right of way granted to the Ohio and Indiana Railroad Company; and also all that part of the west half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) of section seventeen (17), town.
365 thirty (30) north, range thirteen (13) east, which lies north of the grounds of the Ohio and Indiana Railroad Company, containing 23.05 acres, to secure the payment, when it shall become due, of a certain promissory note for four thousand eight hundred and eighty-four and $\frac{19}{100}$ dollars, bearing even date herewith, and payable three (3) years after date, with ten per cent. interest, given by Jacob C. Bowser in favor of David Smith; and the mortgagors expressly agree to pay the sum of money above secured without relief from valuation or appraisement laws.

In witness whereof the mortgagors have hereunto set their hands and seals this first day of June, 1875.

J. C. BOWSER. [SEAL.]
DELILA BOWSER. [SEAL.]

STATE OF INDIANA, } *sct:*
Allen County, }

Before me, Bayless Swift, a notary in and for said county, this first day of June, 1875, personally came Jacob C. Bowser and
366 Delila Bowser, his wife, to me personally know-, and acknowledged the execution of the within mortgage.

Witness my hand and notarial seal.

[SEAL.]

BAYLESS SWIFT,
Notary Public.

Received for record June 1st, 1875, at 4 o'clock p. m., and recorded in Record 27, pages 429.

JOHN M. KOCH,
Recorder of Allen County.

TOLEDO, OHIO, *August 1st*, 1877.

For value received we, as the executors of the last will and testament of David Smith, deceased, hereby assign and transfer to George Milmine, of Toledo, Ohio, all the right, title, and interest of the estate of David Smith, deceased, in and to the foregoing mortgage, and do hereby warrant that the debt secured thereby remains unpaid, except interest thereon up to June 1st, 1876.

W. H. SMITH, [SEAL.]
367 *Executor of the Estate of David Smith, Dec'd.*
SARAH B. SMITH, [SEAL.]
Executrix of the Estate of David Smith, Dec'd.

Signed, sealed, and delivered in presence of—
1. W. S. THURSTON.
2. FLORENCE H. SMITH.

STATE OF OHIO, }
Lucas County, } *sct:*

This day personally appeared before the undersigned, a notary public within and for Lucas county, Ohio, William H. H. Smith and Sarah B. Smith, the executor and executrix of the last will and testament of David Smith, deceased, and who executed the foregoing assignment, and acknowledged the same to be their free act and deed as such executor and executrix.

In testimony whereof I have hereunto set my hand and seal officially this 2d day of August, A. D. 1877, at Toledo, Ohio.

[NOTARIAL SEAL.] WESLEY S. THURSTON,
Notary Public, Lucas County, Ohio.

Received for record this 4th day of Aug., 1877, at 2 p. m. Recorded on the margin of page 429, Book 27.

JOSEPH MOMMER, JR.,
Rec., A. Co.

368 *Copy of Note and Indorsement.*

$4,884.19. FORT WAYNE, IND., *June* 1, 1875.

Three years after date I promise to pay to the order of David Smith four thousand eight hundred and forty-four $\frac{19}{100}$ dollars — Hamilton Bank, Indiana, for value received, without any relief whatever from valuation or appraisement laws, with ten per cent. interest from date, payable annually until paid.

J. C. BOWSER.

Attest: R. C. BELL.

Pay George Milmine or order.

W. H. SMITH,
Executor of the Estate of David Smith, Dec'd.
SARAH B. SMITH,
Executrix of the Estate of David Smith, Dec'd.

And afterwards, to wit, on the 1st day of July, 1878, the same being the 41st juridical day of the April term, 1878, of said court, held at the court-house and before the honorable judge afore-
369 said, the following proceedings were had by said court in this behalf, to wit:

Come the plaintiff, and said defendants, John H. Bass, Hamilton Bank, Fort Wayne National Bank, Martin H. Miller, Martin H. Miller, as administrator of the estate of George Miller, deceased, and Noah Clem, also come, and are ruled to answer said complaint; and it appearing to the satisfaction of the court that said other defendants, Jacob C. Bowser and Delila Bowser and Frederick J. Hayden, had been each duly served with process in this behalf for more than ten days prior to the return day thereof; which process and the return thereon of the sheriff endorsed thereon are in these words, to wit:

STATE OF INDIANA, } ss:
Allen County, }

Superior Court.

State of Indiana to the sheriff of Allen county, Greeting:

370 You are hereby commanded to summon Jacob C. Bowser, Delila Bowser, John H. Bass, Fort Wayne National Bank, Hester A. Wood, Martin H. Miller, Martin H. Miller, administrator of the estate of George Miller, dec'd; Frederick J. Hayden, Hamilton Bank, Noah Clem, imp-ealed with *with* others, to personally be and appear before the judge of the superior court of Allen county on the 1st day of July, 1878, at the court-house, in the city of Fort Wayne, in said county, to answer to the complaint of George Milmine in civil action to foreclose mortgage; demand, $600,000; and of this summons make due return.

[SEAL.] Witness F. H. Wolke, clerk of said court, and the seal thereof, this 5th day of June, A. D. 1878.

F. H. WOLKE, *Clerk.*

Served by reading this writ to Jacob C. Bowser, Delila Bowser, John H. Bass, Hester A. Wood, Martin H. Miller, Martin H. Miller, administrator of the estate of George Miller, deceased; Noah
371 Clem, and on the Hamilton Bank by reading this writ to John Mohr, Jr, who is the cashier of said bank, and on the Fort Wayne National Bank by reading this writ to Stephen B. Bond, who is the president, and Jared D. Bond, who is the cashier, of said bank, this (tenth) 10th day of June, A. D. 1878; served on Fred. J. Hayden

by leaving a true and perfect copy at his last and usual place of residence this 21st day of June, 1878.

CHAS. A MUNSON,
Sheriff Allen Co.

Service & copy	9 00
M. & R.	4 70
Service & copy	90
M. & R.	30
	$14 90

And said defendants, though being each three times called in open court, come not, but herein make default.

And afterwards, to wit, on the 2nd day of July, 1878, the same being the 42nd juridical day of said term of court, held at the court-house and before the honorable judge aforesaid, the following further proceeding were had by said court in this behalf, to wit:

372 Come the plaintiff and shows to the satisfaction of the court that the said defendant, Hester A. Wood, was duly served with process in this behalf for more than ten days prior to the return day thereof, which process and the return of the sheriff endorsed thereon are in these words, to wit (the said process and sheriff's return will be found set out at full length on pages 10 & 11 of this transcript); and the said defendant, Hester A. Wood, being three times called in open court, comes not, but herein makes default.

And afterwards, to wit, on the 8th day of July, 1878, the same being the 44th juridical day of said term of court, held at the court-house and before the honorable judge aforesaid, the following further proceedings were had by said court in this behalf, to wit:

373 Come the parties, and the appearance heretofore entered for the defendants, John H. Bass, The Hamilton Bank, The Fort Wayne National Bank, Martin Miller, — Martin Miller as administrator of the estate of George Miller, deceased, is now withdrawn; and it appearing to the satisfaction of the court that said defendant had been each duly served with process in this behalf for more than ten days prior to the return day thereof, which process and the return of the sheriff endorsed thereon are in these words (the said process and the sheriff's return will be found set out at full length on pages 10 and 11 of this transcript); and said defendants, though being each three times called in open court, come not, but herein make default.

And afterwards, to wit, on the 5th day of August, 1878, the same being the 50th juridical day of said term of court, held at the

374 court-house and before the honorable judge aforesaid, the following further proceedings were had by said court in this behalf, to wit:

Come the parties, and the defendant, Noah Clem, files his answer to said complaint, in one paragraph, in these words, to wit:

Noah Clem, one of the defendants in the above-entitled action, for answer to the plaintiff's complaint, says that he has a prior claim to that of the plaintiff on the following-described real estate in Allen county, State of Indiana, to wit: The northwest corner of the northwest quarter, north of railroad, in section seventeen (17), township 30 north, range 13 east, containing twenty-two & $\frac{5}{100}$ acres; that Jacob C. Bowser, who executed the mortgage to the plaintiff, was the owner of the above-described real estate; that the taxes
for State, county, and township purposes were assessed
375 on said land for the year 187–, amounting to $—; that said
Bowser neglected and refused to pay said taxes, and that they are still unpaid; that on the second Monday of February, 1876, the auditor of the county of Allen, in said State, at the court-house door, publically offered said land for sale to pay said taxes, after having given legal notice of their having become delinquent and of said sale: that, receiving no bid therefor, he declared them forfeited to the State of Indiana; that afterwards, on the 26th day of February, 1876, this defendant paid said taxes, together with legal amount of penalty attached thereto, amounting to $—, to the treasurer of said county; that he thereupon presented the receipt of said
treasurer to the auditor of said county, and received a deed
376 of said land from said auditor, a copy of which is filed herewith; that said deed is not sufficient to convey a good title to said land to this defendant for the reason that at the time said taxes became due, and at the time of said offer to sell, and during all the interim, and for a long time thereafter, said Bowser had personal property in said county subject and liable to pay said taxes; that by the law of the State of Indiana this plaintiff is entitled to have and enforce a lien upon and against said land for the amount of said taxes paid by him, with a penalty of —%, and interest at —%, and sale of the land to pay the same. Wherefore he asks that he be declared to have a first lien upon said land in the sum of three hundred dollars, and that upon sale of this land that he be
paid that sum out of the first moneys, and for other proper
377 relief.

NINDE & ELLISON,
Att'ys for Clem.

(*Copy of Deed from Auditor.*)

No. 4953.

Whereas Noah Clem did, on the fourth day of May, 1878, produce to the undersigned, Wm. T. Abbott, auditor of the county of Allen, in the State of Indiana, a certificate of purchase in writing, bearing date the twenty-sixth day of February, 1876, signed by William T. Abbott, who at the last-named date was the auditor of said county, from which certificate it appears that the said Noah Clem did, on the twenty-sixth day of February, 1876, purchase of said auditor, at private sale, at the court-house, in said county, the tract, parcel, or lot of land lastly in this indenture described, and

which had been offered for sale at public auction, at the door of the court-house, on the second Monday in February, 1876, as
378 provided by law, and, no one bidding, became forfeited to State, and which was sold to Noah Clem for the sum of ninety-nine dollars and — cents, being the amount due on the following tract, parcel, or lot of land, returned delinquent, in the name of Jacob C. Bowser, for the non-payment of taxes, costs, and charges for the year 1874 and former years, to which is added the taxes for the year 1875, to wit: The northwest corner of the northwest quarter north of railroad, in section seventeen (17), township thirty (30) north, range thirteen (13) east, containing twenty-two and $\frac{5}{100}$ acres; which said lands had been recorded (among other tracts) in the office of said auditor as delinquent for the non-payment of taxes, costs, and charges due for the year last aforesaid, and a true copy of the record thereof transmitted to the auditor of State in manner and form as prescribed by law, and legal publication made of
379 the sale of said lands on the said 14th day of February, 1876; and it appearing that the said Noah Clem is the legal owner of said certificate of purchase, and the time fixed by law for redeeming the land therein described having now expired, and none of saving clause of the 101st section of chapter 12, Revised Statutes of 1843, nor of the 154th section of chapter 6, Revised Statutes of 1852, nor of any other law, applying to the aforesaid tract or parcel of land, and neither the said Jacob C. Bowser nor any other — in his behalf having paid or tendered the amount due the said Noah Clem on account of his aforesaid purchase and for taxes by him since paid; and the said Noah Clem having demanded a deed for the tract of land mentioned in said certificate, and which was the least quantity of the tracts above mentioned that would sell for the amount
380 due thereon for taxes, costs, and charges, as above specified, and it appearing from the records of said county auditor's office that the aforesaid lands were legally liable to taxation and had been duly assessed and properly charged on the duplicate with the taxes for the year 1874 and former years, to which was added the taxes for the year 1875:

Therefore this indenture, made this fourth day of May, between the State of Indiana, by Wm. T. Abbott, auditor of said county, of the first part, and the said Noah Clem, of the second part, witnesseth:

That the said party of the first part, for and in consideration of the premises, has granted, bargained, and sold unto the said party of the second part, his heirs and assigns forever, the tract or parcel of land mentioned in said certificate and described as follows, to wit:

381 The northwest corner of the northwest quarter, north of railroad, in section seventeen (17), township thirty (30) north, range thirteen (13) east, containing twenty-two & $\frac{5}{100}$ acres; to have and to hold the said last-mentioned tract or parcel of land, with the appurtenances thereunto belonging, to the said party of the second part, his heirs and assigns forever, in as full and ample a manner as the said auditor of said county is empowered by law to convey the same.

In testimony whereof the said Wm. T. Abbott, auditor of said county of Allen, has hereunto set his hand and affixed the official seal of the board of commissioners of the county of Allen the day and year last above written.

WM. T. ABBOTT,
Auditor Allen County.

Attest:
M. F. SCHMETZER,
Treasurer Allen County.

STATE OF INDIANA, } ss:
Allen County, }

Before me, the undersigned, a notary public in and for said
382 county, this day personally came the above-named Wm. T. Abbott, auditor of said county, and acknowledged that he signed and sealed the foregoing deed for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and seal this fourth day of May, 1878.

[Seal Commissioners' Court, Allen County.]

CHARLES TRESSELT, [SEAL.]
Notary Public.

To which said plaintiff is ruled to reply.

And afterwards, to wit, on the 19th day of September, 1878, the same being the 6th juridical day of the September term, 1878, of said court, held at the court-house and before the honorable judge aforesaid, the following further proceedings were had by said court in this behalf, to wit:

Come the parties appearing [appeared] and the demurrer
383 heretofore filed — the answer of said defendant, Noah Clem, is by the court overruled; to which said plaintiff excepts.

And afterwards, to wit, on the 7th day of October, 1878, the same being the 14th juridical day of said term of court, held at the court-house and before the honorable judge aforesaid, the following further proceedings were had by said court in this behalf, to wit:

Comes now the plaintiff and files his motion upon affidavit for publication as to the non-resident defendants herein; which motion and affidavit are in these words, to wit:

Warren H. Withers, being duly sworn, on his oath says that William F. Meredith, Daniel F. Noyes, William C. Wines, The Huron Iron Company, Thomas Swank, Christian Swank, Joseph M. Sharp, Jeremiah Kerby, Eastern Kentucky Railway, John Herron, Jacob Weis, Frederick Hoffer, Henry Chandler, Hiram Campbell,
John W. Campbell, Joseph H. Campbell, Marcus Hanna,
384 Robert A. Rhodes, James T. Rhodes, Henry Hamilton, Albert H. Diston, William C. Allison, Thomas E. Allison, John R.

Kitt, administrator of the estate of Frederick Bitting, deceased; Charles Huston, Charles Penrose, First National Bank of Philadelphia, Minerva McMahon, Horace G. Cleveland, Peter M. Hitchcock, Aaron M. Wilcox, Martin Bonnell, Joseph H. Brown, Richard Brown, John O. Brown, John McManaman, Mary O'Connell, executrix of the estate of Daniel O'Connell; Frederick Hartmeyer, Cleveland City Forge and Iron Company, Henry A. Rogers, James Ohlen, Henry B. Tillinghast, James Monroe, Oliver B. Tillinghast, Edwin K. Wood, Giles Gilbert, Basil Hendricks, and Lucien J. Knowles, defendants in the above-entitled cause, are, as he is informed and believes, not residents of the State of Indiana; that a cause of action exists in favor of the plaintiff against the said and other defendants in relation to real estate, and that the above-named non-resi-
385 dents are necessary parties to said action.

W. H. WITHERS.

Sworn to and subscribed before me this 20th day of June, 1878.

F. H. WOLKE, *Clerk.*

And the court sustains said motion.

It is therefore ordered by the court that the non-resident defendants herein, to wit, William F. Meredith, Daniel F. Noyes, William C. Wines, The Huron Iron Company, Thomas Swank, Christian Swank, Joseph M. Sharp, Jeremiah Kerby, Eastern Kentucky Railway, John Herron, Jacob Weis, Frederick Hoffer, Henry Chandler, Hiram Campbell, John W. Campbell Joseph H. Campbell, Marcus Hanna, Robert Rhodes, James T. Rhodes, Henry Hamilton, Albert H. Diston, William C. Allison, Thomas E. Allison, Thomas R. Kitt, administrator of the estate of Frederick Bitting, deceased; Charles Huston, Charles Penrose, First National Bank of Philadelphia, Minerva McMahon, Horace G. Cleveland, Peter M. Hitchcock, Aaron M. Wilcox, Martin Bonnell, Joseph H. Brown,
386 Richard Brown, John O. Brown, John McManaman, Mary O'Connell, executrix of the estate of Daniel O'Connell; Frederick Hartmeyer, Cleveland City Forge and Iron Company, Henry A. Rogers, James Ohlen, Henry B. Tillinghast, James Munroe, Oliver B. Tillinghast, Edwin K. Wood, Giles Gilbert, Basil Hamilton, and Lucien J. Knowles, be notified of the pendancy of this suit by publication, in some newspaper of general circulation printed and published in this county, for three consecutive weeks, more than thirty days prior to the 25th day of November, 1878.

The foregoing entry having been omitted to be made on the 30th day of September, the same being the 11th juridical day of this term, it is ordered by the court that said entry be made *nunc pro tunc.*

And afterwards, to wit, on the 28th day of October, 1878,
387 the same being the 24th juridical day of said court, held at the court-house and before the honorable judge aforesaid, the following further proceedings were had by said court in this behalf, to wit:

This cause is continued for the perfection of publication.

And afterwards, to wit, on the 16th day of December, 1878, the same being the 27th juridical day of the November term, 1878, of said court, held at the court-house and before the honorable judge aforesaid, the following further proceedings were had by said court in this behalf, to wit:

Comes now the plaintiff and shows to the satisfaction of the court that due notice of the filing and pendancy of said cause was given said defendants, William F. Meredith, Daniel F. Noyes, William C. Wines, The Huron Iron Company, Thomas Swank, Christian Swank
388 Joseph M. Sharp, Jeremiah Kerby, Eastern Kentucky Railway, John Herron, Jacob C. Weis, Frederick Hoffer, Henry Chandler, Hiram Campbell, John W. Campbell, Joseph H. Campbell, Marcus Hanna, Robert Rhodes, James T. Rhodes, Henry Hamilton, Albert H. Diston, William C. Allison Thomas E. Allison, Thomas R. Kitt, administrator of the estate of Frederick Bitting, deceased; Charles Huston, Charles Penrose, First National Bank of Philadelphia, Minerva McMahon, Horace G. Cleveland, Peter M. Hitchcock, Aaron M. Wilcox, Martin Bonnell, Joseph H. Brown, Richard Brown, John O. Brown, John McManaman, Mary O'Connell, executrix of the estate of Daniel O'Connell; Frederick Hartmeyer, Cleveland City Forge and Iron Company, Henry A. Rogers, James Munroe, Oliver B. Tillinghast, Edwin K. Wood, James Ohlen, Henry B. Tillinghast, Giles Gilbert, Basil Hendricks, and Lucien J. Knowles, by publication on the second, ninth, and sixteenth days
389 of October, 1878, in the Fort Wayne Sentinel, a weekly newspaper of general circulation printed and published in Allen county, Indiana, which publication was more than thirty days prior to the 25th day of November, 1878, the date endorsed on said complaint for the appearance of said defendants; which said notice and proof of publication are in these words, to wit:

Notice.

STATE OF INDIANA, } ss:
Allen County, }

In the Superior Court of Allen County. November Term, 1878.

GEORGE MILMINE
against
JACOB C. BOWSER *et al.* } Foreclosure.

It appearing to the satisfaction of the court by affidavit that William F. Merdith, Daniel F. Noys, William C. Wines, The Huron Iron Company, Thomas Swank, Christian Swank, Joseph M. Sharp, Jeremiah Kerby, Eastern Kentucky Railway, John Herron, Jacob Weis, Frederick Hoffer, Henry Chandler, Hiram Campbell, John
390 W. Campbell, Joseph H. Campbell, Marcus Hanna, Robert Rhodes, James T. Rhodes, Henry Hamilton, Albert H. Diston, William C. Allison, Thomas E. Allison, Thomas R. Kitt, administrator of the estate of Frederick Bitting, deceased; Charles

Huston, Charles Penrose, First National Bank of Philadelphia, Minerva McMahon, Horace G. Cleveland, Peter M. Hitchcock, Aaron M. Wilcox, Martin Bonnell, Joseph H. Brown, Richard Brown, John O. Brown, John McManaman, Mary O'Connell, executrix of the estate of Daniel O'Connell; Frederick Hartmeyer, Cleveland City Forge and Iron Company, Henry A. Rogers, James Ohlen, Henry B. Tillinghast, James Munroe, Oliver B. Tillinghast, Edwin K. Wood, Giles Gilbert, Basil Hamilton, and Lucien J. Knowles are not residents of the State of Indiana, and that a cause of action exists against said defendants in favor of said plaintiff, notice is therefore hereby given said non-resident defendants of the filing and
391 pendancy of said complaint, and that unless they appear before the judge of said court on the 25th day of November, 1878, and answer or demur thereto the same will be heard and determined in their absence.

Attest: FRANK H. WOLKE,
Clerk Allen County.

W. H. WITHERS,
Attorney for Plaintiff.

Oct. 2, 1878.

Proof of Publication.

STATE OF INDIANA, } *ss:*
Allen County, }

In the Superior Court Allen Co., A. D. 1878.

Personally appeared before the undersigned W. E. McDermut, who, being duly sworn according to law, saith that he is one of the publishers of the Fort Wayne Sentinel, a newspaper of general circulation published in said county and State, and that the notice herewith attached was published in the said paper for 3 weeks, the first publication being on the 2nd day of October, 1878, the second on the 9th day of October, 1878, and the third on the 16th
392 day of October, 1878.

W. E. McDERMUT.

Subscribed and sworn to before me this 16th day of December, 1878.

[NOTARIAL SEAL.] EDGAR KEMP,
Notary Public.

And said defendants, Meredith, Noyes, Wines, The Huron Iron Company, Swank, Swank, Sharp, Kerz, Eastern Kentucky Railway, Herron, Weis, Hoffer, Chandler, Campbell, Campbell, Campbell, Hanna, Rhodes, Rhodes, Hamilton, Diston, Allison, Allison, Thomas R. Kit, administrator of the estate of Frederick Bitting, deceased; Huston, Penrose, The First National Bank of Philadelphia, McMahon, Cleveland, Hichcock, Wilcox, Bunnell, Brown, Brown, Brown, McManaman, Mary O'Connell, executrix of the estate of Daniel O'Connell; Hartmeyer, Cleveland City Forge and Iron Company,

Henry A. Rogers, Ohlen, Tillinghast, Munroe, Tillinghast,
393 Wood, Gilbert, Hamilton, and Knowles, being three times severally called, come not, but make default, and said cause is continued.

And afterwards, to wit, on the 13th day of January, 1879, the same being the 1st juridical day of said term of court first aforesaid, held at the court-house and before the honorable judge aforesaid, the following further proceedings were had by said court in this behalf, to wit:

Come the parties, and said plaintiff files his supplemental complaint herein in these words, to wit:

George Milmine, plaintiff in this action, by way of supplemental complaint, complains of the defendants and says that subsequently to the commencement of this action, to wit, on the — day of ——, 1878, the defendant, Jacob C. Bowser, who executed and delivered
394 the note, a copy of which is filed with the original complaint in this action, and also the mortgage filed therewith, was, by the district court of the United States for the district of Indiana, adjudged a bankrupt, and one Gideon W. Seavey was duly appointed and is now the assignee in bankruptcy of his estate, and that the said Gideon W. Seavey, as such assignee, now claims to be the owner of the premises described in the said mortgage filed with the original complaint in this action, subject, however, nevertheless, as the plaintiff avers, to the prior and superior claim of the plaintiff thereon.

And the plaintiff further complains of the defendants and says that since the commencement of this action, and in order to protect his said mortgage security and preserve his claim upon said premises, he has been compelled to and has paid off and discharged the tax lien held on and against the said premises by the defendant, Noah Clem, in the sum of two hundred eighteen and $\frac{65}{100}$
395 dollars ($218.65), and that said Clem has now no interest whatsoever in said premises.

Wherefore the plaintiff prays judgment that the said Gideon W. Seavey, as assignee in bankruptcy of the defendant, Jacob C. Bowser, be made a party to this action and summoned to answer this complaint; that as to the said Gideon W. Seavey, as assignee in bankruptcy of the estate of the defendant, Jacob C. Bowser, the said mortgage be foreclosed; that as to the pretended claim of the defendant, Noah Clem, the said premises be declared free, and that the same has been fully discharged and satisfied; that the amount so as aforesaid, to wit, the sum of two hundred twelve and $\frac{70}{100}$ dollars ($212.70), paid by the plaintiff to preserve and protect his said mortgage
396 security, be declared a lien upon the premises described in the said mortgage, and that the same be added to the amount found due thereon; that the said mortgage, as to the said Clem, be foreclosed; that the said premises, or so much thereof as may be necessary to pay said plaintiff's debt and the said $212.70, be sold, and for other proper relief.

By W. H. WITHERS, *His Att'y.*

And afterwards, to wit, on the 18th day of January, 1879, the same being the 6th juridical day of said term of court, held at the court-house and before the honorable judge aforesaid, the following further proceedings were had by said court in this behalf, to wit:

Comes said defendant Clem and files his answer, admitting payment of tax lien and disclaiming any further interest in said premises, in these words, to wit:

Noah Clem, one of the defendants in the above-entitled
397 action, for answer admit- every allegation contained in said supplemental complaint concerning his rights, and that said Milmine has paid him his lien on said property mortgaged for taxes.

NOAH CLEM,
By NINDE & ELLISON, *His Att'ys.*

And afterwards, to wit, on the 24th day of January, 1878, the same being the 6th juridical day of said term of court, held at the court-house and before the honorable judge aforesaid, the following further proceedings were had by said court in this behalf, to wit:

Come the parties, and Gideon Seavey files his answer as assignee in bankruptcy, and for answer to the plaintiff's supplemental complaint denies each and every allegation therein contained.

And for a second and further answer to said plaintiff's supplemental complaint the defendant, Gideon W. Seavey, admits
398 the allegations therein contained with reference to the alleged bankruptcy of said Jacob C. Bowser and the election of said Gideon W. Seavey as his assignee in bankruptcy, and that he is now acting in said capacity as assignee.

GIDEON W. SEAVEY,
Assignee of J. C. Bowser, Bankrupt.

And, this cause being at issue and a jury being waived herein, this cause is submitted to the court for trial; and, after hearing the proofs, the court finds that there is due said plaintiff on said mortgage debt the sum of $6,830.90.

It is therefor- considered that said plaintiff have and recover from said defendant, Jacob C. Bowser, six thousand eight hundred and thirty dollars and 90 cents, found due as aforesaid, with ten per cent. interest thereon until paid, besides his costs herein expended.

And it is ordered, adjudged, and decreed by the court that
399 said mortgage be, and is hereby, foreclosed as to all said defendants and said mortgaged premises, situate in Allen county, Indiana, and described as the south half (½) of the south half (½) of the southwest quarter (¼) of section eight (8), town. thirty (30) north, range thirteen (13) east; also the east half (½) of the northwest quarter (¼) of section seventeen (17), town. thirty (30) north, range thirteen (13) east (except ten (10) acres in the northeast corner and right of way granted to the Ohio and Indiana Railroad Company), and also all that part of the west half (½) of the northwest quarter (¼) of section seventeen (17), town. thirty (30) north, range thirteen (13) east, which lies north of the grounds of the Ohio and Indiana Railroad Company, containing twenty-three acres, or so much as may be

necessary, be sold by the sheriff of said county, without any relief from valuation or appraisement laws, in manner and form provided by law, as upon execution, and the proceeds applied, first, in
400 payment of the costs of this suit and said sale; second, to the sum adjudged the plaintiff as aforesaid, with ten per cent. interest thereon, and the balance into court to abide the order thereof.

And the court do further say and find that said defendant, Noah Clem, has no right, title, or interest of any kind in or to said mortgage- premises or any part thereof.

STATE OF INDIANA, } ss:
Allen County, }

I, Willis D. Maier, clerk of the circuit court within and for said county and State and *ex officio* clerk of the superior clerk [court] of Allen county, do hereby certify that the above and foregoing transcript contains full, true, and complete copies of all the papers and entries in said cause as the same appear of record and on file in my office.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said superior court, at Fort Wayne, this sixth day of December, A. D. 1883.

WILLIS D. MAIER,
Clerk Superior Court of Allen County.

401 In the Circuit Court of the United States for the District of Indiana.

GEORGE MILMINE }
v.
JOHN H. BASS *et al.* }

It is agreed that the foregoing depositions of Isaac D'Issay, Joseph W. Edsall, George L. Bittenger, Samuel F. Swayne, Henry H. Bossler, Sidney C. Lumbard, K. J. Bauer, Herman Michael, David C. Fisher, Andrew F. Glutting, Robert Stratton, Conrad Dannenfelser, Henry Young, Frederick Gerke, Anthony Kohlmeyer, John H. Bass, William T. Abbott, Simon Edsall, Clarence W. Edsall, Louis S. Maples, Neil McLachlan, Charles L. Olds, Jacob C. Bowser, George D. Crane, and J. D. McHenry were taken by the plaintiff under the agreement on the first page; that the deposition of John H. Bass, at the end, was taken by the defendants by the agreement of both parties; that the said depositions of McHenry and the last of Mr. Bass were taken in short-hand and then copied into long hand,
402 and it is agreed that both may be read without their signatures; that all of said deponents were first duly sworn and said depositions were reduced to writing, except as above stated, in the presence of said parties and by persons authorized by the parties hereto to do so, and that said depositions may be read as evidence in said cause upon being filed in said cause without further authentication or certificate.

COOMBS, BELL & MORRIS,
For Defendants.
NINDE & ELLISON, *For Plaintiff.*

403 *Testimony of Defendants.*

Deposition of William H. Goshorn, witnessed produced and sworn before me, a notary public, of Fort Wayne, Ind., at the office of Coombs, Bell and Morris, in Allen county, State of Indiana, on the 5th day of September, 1884, pursuant to attached notice.

This deposition is taken on the part of the defendant in a certain action now pending in the circuit court of the U. S. for the district of Indiana, wherein George Milmine is plaintiff and John H. Bass *et al.* are defendants. The defendant appeared by attorney; plaintiff did not appear.

Interrogatory. What is your name, age, and place of residence?

Answer. William H. Goshorn; forty-eight years old; 102 E. Washington street, Fort Wayne, Ind.

Int. How long have you resided in Fort Wayne, and in what business have you been engaged during that time?

404 A. I have been here 17 years, and I have been county surveyor for twelve years and acting as surveyor all the time.

The defendant now produces a plat of parts of section 7, 8, and 17, in township 30, range thirteen (13), and asks that the same may be marked as Exhibit "A" to this deposition, which is accordingly done.

Int. Now look at the map above referred to and say who prepared the same.

A. I did.

Int. Is that a substantially correct map of the parts of section-seven (7), eight (8), and seventeen, in township 30, range 13, in Allen county, Indiana, or not, as delineated thereon?

A. It is correct.

Int. Please state where the eastern boundary of the city is as delineated on that map.

A. It would be the west line of section seven (7) and
405 marked "city limits."

Int. What quantity, as near as you can estimate, remains vacant on the east side of the city and west of the eastern city limits? I mean such as had not been built upon as city lots.

A. About two hundred acres, as near as I can estimate.

Int. Are you acquainted with the land in controversy in this suit; and, if so, how is it designated on your map?

A. I am, and it is designated by blue (made red by clerk in copy attached hereto) lines running parallel diagonally across it, and marked John H. Bass.

Int. What is the distance from the eastern city limits to the nearest point of the land in controversy in this suit?

A. Seven-eighths of a mile.

Int. If Fort Wayne should continue to increase — that it has

since you have known it, in the different directions, how long,
406 in your judgment, would it take to extend the city to the land in controversy, so as to render it valuable for city lots?

A. It would take fifty years.

W. H. GOSHORN.

STATE OF INDIANA, } ss:
County of Allen, }

I, John Morris, Jr., a notary public in and for said county, do hereby certify that William H. Goshorn, the above-named deponent, was by me first duly sworn to tell the truth, the whole truth, and nothing but the truth in the cause now pending in the circuit court of the United States for the district of Indiana, wherein George Milmine is plaintiff and John H. Bass *et al.* are defendants; that the foregoing deposition was all written by me, and that said deponent subscribed his deposition after the same had been carefully read over to him by me; that the plaintiff was present by attorney at the taking of said depo-
407 sition; that said deposition was taken at the office of Coombs, Morris & Bell, in the city of Fort Wayne, in the county of Allen and State of Indiana, between the hours of 8 a. m. and 6 p. m. of said day.

In witness whereof I hereunto subscribe my name and affix my official seal this 5th day of September, 1884.

JOHN MORRIS, JR., [SEAL.]
Notary Public.

Notice.

THE STATE OF INDIANA, } ss:
Allen County, }

In the Circuit Court of the United States. —— Term, 18—.

GEORGE MILMINE }
v. }
JOHN H. BASS *et al.* }

The plaintiff in the above-entitled cause is hereby notified that on the 5th day of September, 1884, at the office of Coombs, Bell and Morris, in the city of Fort Wayne, in the county of Allen and State of Indiana, between the hour- of 8 a. m. and 6 o'clock p. m. of said day, before some officer authorized to take depositions, the defendants will proceed to take the depositions of William Goshorn, C. D.
408 Law, and Joseph Woods, witnesses, to be used in evidence on the trial of said cause, and will, if necessary, continue said taking from day to day until said depositions are completed.

Dated this 3rd day of September, 1884.

COOMBS, BELL & MORRIS,
Att'y- for ——.

We acknowledge service of the above notice and waive dedimus

and certificate of official character of officer before whom said depositions are taken.

This 3rd day of Sept., 1884.

NINDE & ELLISON,
Attorney- for ——.

Exhibit "A" will be found on next page.

(Here follows diagram marked page 408*a*.)

409 *Stipulation No.* 1 *to Report.*

It is hereby agreed by the parties in the above-entitled action that the following facts are true, and that this statement may be read and used as part of the evidence in said action, provided, however, the court shall deem the same relevant and material to the issues made therein:

1st. That on the 12th day of May, 1873, Jacob C. Bowser was the owner of the following real estate in Allen county, Indiana, to wit:

The south half of section 27, township 31, range 13 E.

The fractional northwest quarter of section 34, township 31, range 13 E.

Sixty (60) acres off of the west side of the north half of the southeast quarter of section 6, township 30, range 15 E.

The south half of the southwest quarter of section 30, town-
410 ship 31, range 15 E.

The southeast quarter of the southeast quarter of section 34, township 29, range 15 E.

The undivided one-half ($\frac{1}{2}$) of the east half of the southwest quarter of section 33, township 30, range 14 E.

The undivided three-eight-s ($\frac{3}{8}$) of the west half of the west half of the northeast quarter of section 5, township 29, range 14 E.

The undivided one-third ($\frac{1}{3}$) of the south half of the south half of the northeast quarter of section 32, township 30, range 14 E.

The undivided three-eighths ($\frac{3}{8}$) of the south half of section 32, township 30, range 14 E., except that part platted as the town of Maples, and 1st and 2nd Additions to Maples, containing about ~~1~~ acre.

The undivided one-third ($\frac{1}{3}$) of the north half of the north-
411 west quarter of section 5, township 29, range 14 E., containing 56.52 acres.

Lots 116 and 117 in the original plat of Fort Wayne.

The undivided one-half ($\frac{1}{2}$) of lots 16 and 17, in the original plat, and the undivided one-half ($\frac{1}{2}$) of lots 565, 566, and 567, in Hanna's Addition to the city of Fort Wayne.

Lots 17, 18, 28, 31, 34, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, and 49, in Bowserville.

The undivided three-eight-s ($\frac{3}{8}$) of lot 20, original town of Maples.

Lot No. 1 of subdivision of north $\frac{1}{2}$ of outlots No. 6, Hanna's outlots, in sec. 2, T. 30, R. 12.

The undivided three-eight-s ($\frac{3}{8}$) of the west 60 feet and the middle

60 feet of lot or block 2, all of lot or block 5, and the middle 60 feet and east 60 feet of lot or block 6, in 1st Addition to the town of Maples.

The undivided three-eight-s. (3/8) of lots 1, 2, 3, 4, 10, 11, 12,
412 13, 14, 15, 16, 17, and 18, in 2d Addition to the town of Maples.

Also the lands described in complainant's mortgage.

That said Bowser's title to and deed of said property was recorded in the recorder's office of said Allen county at that time, and continued on said records as and was his property until the 10th day of July, 1878, except the following, which were sold on the following dates:

The west half of the S. E. qr. of section 27, T. 31, R. 13, sold by sheriff to J. H. Bass July 26, 1876, on judgment rendered in the Allen circuit court April 16, 1876, favor of Fort Wayne National Bank.

The west half of S. W. qr. of section 27, T. 31, R. 13, sold by sheriff to J. H. Bass Dec. 23, 1876, on judgment rendered in the Allen circuit court Febr'y 7, 1876, favor Hamilton Bank.

413 The S. E. qr. of S. E. qr. of section 27, T. 31, R. 13, sold by sheriff to J. H. Bass Dec. 1, 1877, on judgment rendered in the Allen circuit court Febr'y 17, 1876, favor of Daniel Noyes *et al.*

The fractional N. W. qr. of section 34, T. 31, R. 13, sold by sheriff to J. H. Bass Dec. 23, 1876, on judgment rendered in the Allen circuit court April 5, 1876, favor Samuel C. Evans.

Lots 17 and 31, Bowserville, sold by J. C. Bowser to John G. Ruge Sept. 22, 1876.

Lot 47, Bowserville, sold by sheriff to Fred'k Kanning Dec. 30, 1876, on judgment rendered in the Allen circuit court Oct. 25, 1876, favor said Kanning.

Lot 34, Bowserville, sold by sheriff to J. H. Bass Dec. 23, 1876, on judgment rendered in the Allen circuit court April 17, 1876, favor Thomas Swank *et al.*

Lots 40, 41, and 43, Bowserville, sold by sheriff to L. Trex-
414 ler March 3, 1877, on judgment in the Allen circuit court March 31, 1876, favor said Trexler.

Sixty (60) acres off W. side, north half of S. E. qr. of section 6, T. 30, R 15, sold by sheriff to J. H. Bass Jan'y 13, 1877, on judgment rendered in the Allen circuit court April 18, 1876, favor Fort Wayne National Bank.

The undivided one-half (1/2) of lots 16 and 17, original plat, and undivided one-half (1/2) of lots 565, 566, and 567, Hanna's Addition to Fort Wayne, sold by J. C. Bowser to Neil McLachlin and Chas. L. Olds June 14, 1876.

Lot No. 1 of subdivision of north 1/2 of outlot No. 6, Hanna's outlots, in sec. 2, T. 30, R. 12, sold by J. C. Bowser Oct. 21, 1876, to Wm. L. Hulse and H. Hilbright.

Lot 18, Bowserville, sold by J. C. Bowser to Sarah M. Bowser Oct. 7, 1876.

415 Lot 28, Bowserville, sold by J. C. Bowser to the city of Fort Wayne June 22, 1875.

Lot 39, Bowserville, sold by J. C. Bowser to Coombs, Morris and Bell Oct. 26, 1876.

Lot 42, Bowserville, sold by auditor of Allen county to D. P. White at tax sale, Feb'ry, 1879.

Lot 49, Bowserville, sold by sheriff to I. Lauferty Feb'ry 17, 1877, on judgment rendered in the Allen circuit court, April term, 1876, favor said Lauferty.

2nd. That the complainant herein did not know of the release of lots 116 and 117, original plat, by Stearns *et al.* from the levy of their execution issued on their judgment, nor did he know of the levy by the same parties of their execution issued on said judgment on the property mortgaged to him, nor the sale of the same to the defendant, John H. Bass, until long after the year to redeem
416 the same had expired.

3rd. And it is further agreed that the following specific liens were on said lots 116 and 117, original plat, on July 6, 1878, when said lots were released from said levy, to wit:

Decree of foreclosure on mortgage, favor of Hartmeyer, April 2, 1877, for	$6,455 15	
And costs, taxed at	18 60	
Interest, 6 per cent., to July 6, 1878	490 37	
		$6,964 12
Amount paid by J. H. Bass to John W. Laugrhr for quitclaim deed for lien by reason of tax deed against lot 117, March 7, 1878	$236 19	
Interest, 6 per cent., to July 6, 1878	5 72	
		241 91
Amount paid by J. H. Bass on purchase of lot 116 at sale for county taxes,		
417 Febr'y 11, 1878	$211 46	
Add 15 per cent. penalty	31 71	
		243 19
City taxes paid by J. H. Bass April 26, 1878, on lot 116	$104 20	
April 26, 1878, on lot 117	395 21	
		559 41
Total		$8,008 63

4th. And it is agreed that the following parcels of real estate was [were] as follows, to wit:

Sixty (60) acres off W. side north half of S. E. qr. of section 6, T. 30, R. 15, $10.00 per acre.

The south half of S. E. qr. of section 30, T. 31, R. 15, 80 acres, $10.00 per acre.

The S. E. qr. of S. E. qr. of section 34, T. 29, R. 15, 40 acres, $10.00 per acre.

The undivided three-eight-s (3/8) of west half of west half of N. E. qr. of section 5, T. 29, R. 14, 40 acres, $15.00 per acre.

The undivided one-third (⅓) of north half of N. W. ¼ of
418 section 5, T. 29, R. 14, 56.52 acres, $15.00 per acres.

That the mortgage from Jacob C. Bowser and wife to David Smith was duly recorded in the recorder's office of Allen county, Indiana, on the 1st day of June, 1878, as required by law, and that the assignment thereof to the plaintiff was duly recorded in said recorder's office August 4, 1877.

That the defendants, Gardner, Blish & Co., defendants in the case of Stearns *et al.* against Gardner *et al.*, paid interest on said judgment at the rate of ten per cent. from the date of said judgment until January 1st, 1877, part of which, viz., from July 20, 1876, to January 1, 1877, was in advance and under an agreement that no execution should issue on said judgment until said 1st day of January, 1877, and no execution was issued, because of said agreement, until after January 1, 1877.

419 That an execution was issued April 1, 1873, on the judgment rendered in the court of common pleas of Allen county February 23, 1873, in favor of E. Kegg and against Jacob C. Bowser *et al.* for the full amount thereof, and levy made thereunder on personal property of the said defendants therein, appraised at $2,500, which levy remained undisposed of until November 21, 1879.

That an execution was issued March 11, 1873, on the judgment rendered in the court of common pleas of Allen county February 26, 1873, in favor of W. H. Bloom *et al.* and against Jacob C. Bowser *et al.* for the full amount thereof, and levy made thereunder on personal property of the said defendants therein, appraised at $2,500.00, which levy remained undisposed of until November 21, 1879.

That an execution was issued March 14, 1873, on the judg-
420 ment rendered in the Allen circuit court February 13, 1871, in favor of J. T. Mills *et al.* and against Jacob C. Bowser *et al.* for the full amount thereof, and levy made thereunder on personal property of the defendants therein, which levy remained undisposed of July 6, 1879.

That an execution was issued January 1, 1873, on the judgment rendered in the Allen circuit court May 6, 1872, in favor of D. Shaw and against Jacob C. Bowser *et al.* for the full amount thereof, and levy made thereunder on personal property of the said defendants therein, appraised at $2,500.00, which levy remained undisposed of November 21, 1879.

That an execution was issued March 13, 1873, on the judgment rendered in the Allen circuit court June 13, 1872, in favor of R. Keane and against Jacob C. Bowser *et al.* for the full amount thereof, and levy made thereunder on personal property of the said
421 defendants therein, appraised at $2,500.00, which levy remained undisposed of until November 21, 1879.

That an execution was issued December 24, 1872, on the judgment rendered in the Allen circuit court June 17, 1872, in favor of Ed. Ney and against Jacob C. Bowser *et al.* for the full amount thereof, and levy made thereunder on personal property of the said defendants therein, appraised at $2,500.00, which levy remained undisposed of until November 21, 1879.

That an execution was issued November 22, 1876, on the judgment rendered in the Allen circuit court February 13, 1873, in favor of First National Bank of Cambridge City and against Jacob C. Bowser *et al.* for the full amount thereof, and levy made on lots No. 116 and 117, original plat of Fort Wayne, appraised at
422 $27,000, which levy remained undisposed of July 6, 1879.

That an execution was issued June 12, 1877, on the judgment rendered in the Allen circuit court May 12, 1873, in favor of H. E. Stearns *et al.* and against Gardner *et al.*, as principals, and Jacob C. Bowser *et al.*, as surities, for $2,212.85 and costs, and levy made thereunder on lots No. 116 and 117, original plat of Fort Wayne, which levy remained undisposed of until July 6, 1879.

That an execution was issued November 3, 1876, on the judgment rendered in the Allen circuit court March 29, 1875, in favor of C. H. Reed and against Jacob C. Bowser *et al.* for the full amount thereof, and levy made on real estate of the defendant Bowser, which judgment was fully satisfied October 25, 1877.

That the judgment rendered in the Allen circuit court Sep-
423 tember 9, 1875, in favor of Phillips and Jordan Iron Company and against Jacob C. Bowser *et al.* for $198.74 and costs, was fully paid and satisfied as follows:

Feb'y 27, 1877, paid $196.22.

Sept. 1, 1877, paid in full, $19.00.

Sept. 1, 1877, paid costs.

That an execution was issued August 8, 1876, on the judgment rendered in the Allen circuit court February 7, 1876, in favor of Hamilton Bank and against Jacob C. Bowser *et al.* for the full amount thereof, and levy made on real estate of defendants therein, and said writ satisfied by sale December 23, 1876.

That an execution was issued August 11, 1876, on the judgment rendered April 5, 1876, in the Allen circuit court in favor of S. C. Evans and against Jacob C. Bowser *et al.* for $553.12 and costs, and levy made on real estate of the defendants therein, and said
424 writ satisfied by sale December 23, 1876.

That an execution was issued August 18, 1876, on the judgment rendered February 17, 1876, in the Allen circuit court — favor D. Noyes and against Jacob C. Bowser *et al.* for $444.74 and costs, and levy made on real estate of the defendants therein, and said writ satisfied by sale December 23, 1876.

That an execution was issued July 19, 1876, on the judgment rendered April 17, 1876, in the Allen circuit court in favor of Huron Iron Company and against Jacob C. Bowser *et al.* for $256.58 and costs, and levy made thereunder on lot No. 49, Bowserville, which execution was returned January 22, 1877, and on same day *vendi. exponas* issued, which *vendi.* was levied on S. E. ¼ of S. E. ¼ of sec. 34, T. 29, R. 15 E., and said last tract sold by sheriff to said Huron Iron Company December 1, 1877; certificate tendered and refused.

425 That an execution was issued October 14, 1876, on the judgment rendered April 17, 1876, in the Allen circuit court in favor of T. Swank *et al.* and against Jacob C. Bowser *et al.* for $221.33

and costs, and levy made on lot No. 34, Bowserville, and said writ satisfied by sale December 23, 1876.

That an execution was issued April 24, 1876, on the judgment rendered April 18, 1876, in the Allen circuit court — favor Fort Wayne National Bank and against Jacob C. Bowser *et al.* for $536.33, and levy made on real estate of defendant-.

That an execution issued June 30, 1876, on the judgment rendered June 7, 1876, in the Allen circuit court — favor J. M. Sharpe and against Jacob C. Bowser *et al.* for $169.68 and costs, and levy made thereunder on lot No. 42, Bowserville, as the property of the
426 defendants therein, which levy remained undisposed of July 6, 1879.

Sept. 24, 1884.

R. S. TAYLOR,
Att'y for Bass et al.
NINDE & ELLISON,
For Milmine.

Stipulation No. 2 to Report.

It is stipulated and agreed in said cause that the annexed letter was written and sent to J. C. Bowser and Co., at the time it bears date, by H. E. and C. F. Stearns & Co., being the same firm mentioned in the pleadings and proof in this cause as judgment creditors of Gardner, Blish and Co. and J. C. Bowser and Co., and that the endorsement on the back of the same, signed "J. C. Bowser & Co.," was written and signed at the time it bears date by Jacob C. Bowser, and by him returned to H. E. and C. F. Stearns and Co.

It is also stipulated and agreed that the defendant, Jacob
427 C. Bowser, was born April 8, 1808, and married prior to 1860 to Delilah Bowser, who was born May 3, 1815, and who is still living and his wife.

T. E. ELLISON, *For Pl'ff.*
R. S. TAYLOR, *For De'f't.*

The Letter.

Office of Peru Woolen Mills; H. E. and C. T. Stearns & Co.

PERU, IND., *April 9th*, 1875.

Mess. J. C. Bowser & Co., Fort Wayne, Ind.

GENTS: Refer-ing to the conversation had with your Mr. J. C. Bowser, when he was here some time ago, during which he expressed the wish of your house that we should not push the collection of the judgment we hold against you and Mess. Gardner, Blish &
428 Co. for the present, we would make of you the following inquiry: Should we agree with Mess. Gardner, Blish & Co. to forbear at present or at any time from ordering out an execution on the judgment rendered in our favor in the — court of your county against themselves and your house, said judgment having been rendered on a certain acceptance of yours dated on or about the

22d of January, 1873, and should we, in pursuance of such agreement, receive from them any interest on said judgment in advance of the date when such payment may be made by them, would it meet your own approval and will you thus agree that such payment of interest when made by them is also made by and with your full approval and consent as joint judgment defendants? If so, please answer affirmatively on the face or back of this letter.

Resp'ly, H. E. AND C. F. STEARNS & CO.

429 Endorsed.

FORT WAYNE, *April* 13, 1875.

We agree to the within proposition as stated.

J. C. BOWSER & CO.

Stipulation No. 3 to Report.

It is stipulated and agreed by and between the parties to said cause that the mortgages hereinafter named were executed to and by the parties hereinafter named, and for the sums and upon the dates named, and that the judgments hereinafter named were taken in the courts named, upon the dates named and in favor of the parties named, against Jacob C. Bowser & Co., and this agreement is to be taken with like effect upon the hearing of said cause as though the original mortgages and judgments were offered in evidence.

430 Mortgages:

J. R. Prentis and David M. Falls and wife to M. E. Woodward, undivided half of foundary, to secure $8,000, reduced by payments prior to Nov. 6, 1879, to	$2,800 00
Jacob C. Bowser and wife to Annie C. Ketcham, Dec. 7, 1870, foundary property	4,000 00
Jacob C. Bowser and wife to Frederick Hartmeyer, Dec. 19, 1872, lots 116 and 117, O. P. Fort Wayne, Ind.	5,000 00
Jacob C. Bowser and wife and Prentis and Falls and their wives to Caroline Nutman, Jan'y 27, 1874, the entire fundary	4,000 00
Jacob C. Bowser and wife and Prentis and Falls and wives to Joseph D. Nutman, May 18, 1874, entire foundary, including all tools, patterns, &c.	10,000 00

431 Judgments Allen common pleas:

E. Kegg, February 23, 1873	66 24
Costs—original, $9.80; accrued, $14.50	24 30
W. H. Bloom *et al.*, Feb'y 26th, 1873	171 50
Costs—original, $9.83; accrued, $28.30	38 13
Allen circuit court:	
J. I. Mills *et al.*, Feb'y 13, 1871	1,105 00
Costs—original, $4.40; accrued, $12.10	16 50

D. Shaw, May 6, 1872	35 84
Costs—original, $10.15; accrued, $19.10	29 25
R. Kearns, June 13, 1872	62 00
Costs—original, $12.98; accrued, $33.65	46 63
E. Ney, June 17, 1872	700 00
Costs—original, $149.93; accrued, $23.30	173 23
First Nat. Bank, Cambridge, Feb'y 13, 1873	1,452 39
Costs	13 38
J. W. Williams, November 5, 1873	90 00
Costs	18 65
C. H. Reed, March 29, 1875	530 50
Costs—original, $11.53; accrued, $3.00	14 53
Phillips and J. Iron Co., September 9, 1875	198 79
Costs—original, $9.91; accrued, $1.50	14 40
Hamilton Bank, February 7, 1876	840 72
Costs	10 05
432 S. C. Evans, April 5, 1876	553 12
Costs	10 35
D. Noyes, February 17, 1876	444 74
Costs—original, $7.46; accrued, $2.76	10 22
J. S. Reed, trans., April 20, 1876	98 84
Costs	3 80
Wellers Bro-., trans., April 20, 1876	132 61
Costs	8 85
I. Lauferty, April 17, 1876	279 58
Costs	12 85
Huron Iron Co., April 17, 1876	256 58
Costs—original, $6.50; accrued, $20.40	26 90
T. Swank *et al.*, April 17, 1876	221 33
Costs	8 00
Fort Wayne National Bank, April 18, 1876	536 33
Costs	11 85
J. M. Sharpe, June 7, 1876	169 68
Costs	11 85
J. Kirby, June 7, 1876	285 94
Costs	14 50
East Ky. R. R., June 8, 1876	266 58
Costs	10 86
S. J. Wiley *et al.*, June 21, 1876	941 61
Costs	11 65
L. Trexler, March 31, 1876	630 50
Costs	12 40
J. W. Herron, September 6, 1876	725 46
Costs	20 56
433 F. Kanning, October 25, 1876	122 50
Costs	15 68
F. Kanning, October 25, 1876	106 17
Costs	14 95

Taxes:

S. ½,	sec. 27, 31, 13	935 70
N. W. ¼,	" 34, 31, 13	318 86
Pt.	" 17, 30, 13	692 11
S. ½ S. ½ S. W. ¼,	" 17, 30, 13	182 46
W. end, N. ½ S. W. ¼,	" 6, 30, 15	50 00
E. ½ S. W. ¼,	" 16, 30, 12	30 72
S. ¼ S. W. ¼,	" 30, 31, 15	146 11
S. E. ¼ S. E. ¼,	" 34, 29, 15	20 39
Lots 116 and 117, O. P.		860 24
Lots 34, 44, 45, 46, 48, Bowserville		199 25

NINDE & ELLISON,
Attorneys for Milmine.
R. S. TAYLOR,
Attorney for Bass.

It is stipulated further, as part of the foregoing agreement, that the personal property levied on under the judgments of E. Kegg, W. H. Bloom *et al.*, D. Shaw, R. Keen, and Ed. Ney was the same in each case; that it consisted of three engines and certain shaft-
434 ings and connections, the whole of which was appraised at the time of the levy at $2,500; that it was appraised when levied upon at $2,500; that it was offered for sale twice, and at the second sale again appraised at $2,500, but remained unsold for want of bidders; that it was afterwards re-appraised at $310 and sold on Nov. 21, 1879, upon execution issued on the judgment of Edward Ney for $246.55

NINDE AND ELLISON,
For Milmine.
R. S. TAYLOR, *For Bass.*

435 *Master's Report.*

The undersigned, W. P. Fishback, master in chancery, to whom this case was referred, now respectfully reports to the court as follows:

By written agreement, signed by counsel for plaintiff and defendants, which is filed herewith, the master heard this cause, in the city of Fort Wayne, on Friday and Saturday, the 29th and 30th days of May, 1885. At said hearing I was attended by Messers. L. M. Ninde and T. E. Ellison, for the plaintiff, and by R. S. Taylor and R. C. Bess, for the defendant Bass; there was no appearance for either of the other defendants.

The evidence presented consists of the following items:

Stipulations numbered 1, 2, and 3, which are attached hereto and made part of this report.

The deposition of John L. Farrar, which is undated and is admitted under a stipulation appended thereto, signed by Ninde and
436 Ellison, for plaintiffs, and R. S. Taylor, for the defendants.

The depositions of Daniel M. Falls, Jacob J. Kern, and Francis H. Wolke, with the exhibits attached thereto, which depo-

sitions were taken before Geo. B. Crane, notary public, September 30, 1884, and marked, filed, and published October 2, 1884.

Also another deposition of John L. Farrar, undated and introduced under a stipulation attached to the same waiving certificate and authentication; which stipulation is signed by R. S. Taylor, for the defendants, and T. E. Ellison, for the plaintiff.

Also the depositions of Isaac d'Issay, Joseph M. Edsall, G. L. Bittenger, S. F. Swayne, H. H. Bossler, Sidney C. Lumbard, K. J. Bauer, Herman Michael, David C. Fisher, Andrew F. Glutting, Robert Stratton, Conrad Dannenfelser, Henry Young, Frederick Gerke, Anthony F. Kohlmeyer, John H. Bass, the defendant; William T. Abbott, Simon Edsall, Clarence W. Edsall, Lewis S. Maples,
437 Niel McLachlin, Chas. L. Olds, Jacob C. Bowser, Geo. D. Crane, J. D. McHenry, and John H. Bass (second deposition), together with the exhibits attached to said depositions and offered in evidence in connection therewith.

Abstract of Bill.

The bill sets forth that on the first day of June, 1875, the defendant-, Jacob C. Bowser and wife, gave a mortgage on a tract of land in Allen county, Indiana, to secure a note for $4,885.19, bearing even date of the mortgage, payable three years after date, with ten per cent. interest, to one David Smith, who was then a resident of the State of Ohio; that the mortgage was recorded the same day Smith died, and Milmine became the assignee of the note and mortgage on the first of August, 1877; that the assignment was duly noted on the margin of the record of the mortgage, in Allen county, August 4, 1877.

438 That on the fifth of June, 1878, plaintiff instituted a suit to foreclose the mortgage, in which suit the defendant, John H. Bass, and many others were defendants. It is averred in the bill that in the suit to foreclose the plaintiff set forth the note and the mortgage and the assignment thereof, and that the claims of all the defendants named in said complaint were junior and subsequent to the lien of the mortgage.

That in the foreclosure suit the plaintiff filed a supplemental complaint on the 13th day of January, 1879, in which it was averred that it had been ascertained that the claim of one of the defendants, Noah Clem, was for a tax deed issued to him before the suit was brought, and that complainant had paid the sum of $212.70 to discharge said tax lien. The prayer of the supplemental bill was that the sum so paid should be decreed to be a lien upon the premises prior to all claims or liens of the defendants.

439 That on the 24th of January, 1879, the plaintiff recovered judgment in that suit for the amount due upon his note and mortgage and the amount of the tax lien paid by him, the decree amounting in all to $68,300.00 and $54.75 costs. There was also a decree that the mortgaged premises be sold by the sheriff to satisfy *to satisfy* the decree; that the plaintiff, Milmine, purchased the premises at sheriff's sale on said decree on the first day of March,

1879, and that, no redemption having been made within the year, the sheriff conveyed *conveyed* the property to him by deed, and that the amount of his bid at the sale was $7,048.70, $6,900.18 of which he paid by receipting the judgment and interest, and the balance, $148.52, was paid to the sheriff in cash.

The bill further alleges that on the 12th day of May, 1873, Harmon E. Stearns and others recovered a judgment in the Allen
440 circuit court against Gardner, Blish & Co., as principals, and Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls, as sureties, for $2,212.85 and costs, taxed at $470, in which judgment the fact was found and adjudged that Bowser, Prentis, and Falls were sureties only, and that Gardner, Blish & Co. were the principal debtors.

That the principal debtors made the following payments on said judgment, viz., December 31, 1873, $354.93; January 1, 1874, $145.07, and on May 1st, 1874, the principal debtors paid to the judgment plaintiffs the accrued interest of the judgment up to said last-named date; that on the 20th day of June, 1876, they paid accrued interest up to that date, and also paid the sum of $322.50, being the interest that would accrue upon the amount of said judgment, then due, up to and until the 1st day of January, 1878,
441 from said 20th day of July, 1876, when the same was paid.

It is alleged that the interest so paid on July 20th, 1876, was paid in advance up to January 1, 1877, upon a contract and agreement made between the principal debtors and the judgment creditors that no execution should issue upon the judgment from July 20th to January 1st, 1877, which agreement, it is averred, was fully carried out, and that no execution was issued until June 12th, 1877.

That it was stipulated by said agreement between the judgment plaintiffs and the principal debtors that if the latter would pay such interest in advance further time would be given the principal debtors.

And it is averred that Bass knew when he purchased the said land upon which plaintiff said the mortgage was a lien that such payments had been so made.

It is alleged that the effect of such agreement was to discharge Bowser, Prentis and Falls, who were the sureties under such
442 judgment, from all liability on said judgment, and that at the time the extension was granted said Prentis and Falls were solvent and said judgment could have been collected from either of them.

It is further alleged that on the 12th day of June, 1877, the judgment plaintiffs caused execution to issue on said judgment to the sheriff of Allen county, commanding him to make the sum of $2,212.85 and costs and interest, when there was only the sum of $1,552.05 due thereon; of all of which the defendant Bass had noticed when he purchased the property in controversy.

That the sheriff of Allen county levied said execution upon lots No. 116 and 117, in the original plat of the city of Fort Wayne, ad-

vertised and offered said lots for sale on the 21st day of July, 1877, and made a return that they were not sold for want of bidders.

That on the 9th of October, 1877, the judgment plaintiffs
443 caused an execution to issue upon the same judgment, which was returned by the sheriff on the 25th of October, 1877, as having been duly served upon said principal judgment defendants, but that no property could be found whereon to levy.

That on the 26th of November, 1877, the judgment plaintiffs caused a *vendi.* to issue upon said judgment, in which was recited the former levy upon said lots No. 116 and 117, and ordered the sheriff to sell said property; which said *vendi.* was duly returned December 22d, 1877, that the sheriff had advertised the sale and had made no sale for want of bidders.

That on the 5th of July, 1878, the judgment plaintiffs caused a second *vendi.* to be issued, demanding him to sell the same lots.

It was then alleged that, with full knowledge that the plaintiff had a mortgage upon the lots described in his mortgage, and that
444 he had filed his complaint to foreclose the same in the superior court of Allen county, and that a suit was then pending for that purpose, the defendant Bass entered into a combination with the judgment plaintiffs, Stearns and others, and their attorneys that the judgment plaintiffs and their attorneys should abandon the levy made upon lots 116 and 117, which were amply sufficient in value to pay said judgment, and to procure the return of said *vendi.* and the issuance of a *fieri facias* upon the same.

That is [it] was agreed among said parties that said *vendi.* should be returned with an endorsement thereon, that said levy should be abandoned, and that the sheriff should make the following endorsement thereon, viz:

"This execution is returned unsatisfied; the within levy released. The clerk will please issue *alias* execution July 6, 1878.
445 C. A. MUNSON, *Sheriff*,
By PLATT J. WISE, *Deputy*."

That it was a part of said combination and conspiracy that when said *alias* execution should be issued it should be levied upon the premises covered by the plaintiff's mortgage; that it should be advertised and sold to the defendant Bass for about the amount of the judgment, interest, and costs, and in that way cut out the plaintiff's mortgage and wholly destroy his interest in the premises, and prevent him from recovering anything on his deed.

That the judgment plaintiffs, knowing that there was $1,552.05 due on their judgment, caused said execution to issue for the sum of $2,212.85 and, in combination with the said defendant Bass, who knew the real amount due, caused the same to be levied upon the land covered by the plaintiff's mortgage; that Bass bought
446 the same at sheriff's sale, August 3d, 1878, for $2,000.00.

That when said combination was entered into and said execution issued and said sale made said parties who were concerned therein knew that Milmine lived in Toledo, Ohio, and that the Fort Wayne Sentinel, in which the advertisement of sale was published,

had a small circulation, and that there was no likelihood or probability that Milmine would ever see a paper containing the notice. Plaintiff avers that he did not know or learn or suspect in any manner whatever that Stearns and other judgment plaintiffs released or consented to release said lots 116 and 117, or ordered the return of said *vendi.*, or caused said *alias* execution to be issued or said premises to be sold, or that Bass had bought the same and procured the sheriff's deed therefor, until long after all said acts and things had taken place and been completed.

447 That he had a right to rely upon the fact that the said judgment debt of Stearns & Co. was duly levied upon said two lots; that said two lots were worth largely over and above the judgment debt, and that the same was in law satisfied until said levy was legally disposed of by the sale of the property.

He avers that such levy was, as to him, a satisfaction of said judgment, so far as the lien thereof affected his said mortgaged premises, until the property levied on was sold or should be released by his consent.

The bill further sets out that at the time the Stearns & Co. judgment was recovered the defendant Bowser owned in fee simple about $27,000.00 worth of real estate in Allen county, besides the property covered by plaintiff's mortgage, upon which said judgment became a lien; that said lots 116 and 117 were also then owned by

448 Bowser, which lots were then and ever since have been worth at least $6,000.00 in cash, making in all real estate worth at least $33,000.00 and more, which was subject to the lien of said Stearns' judgment, other than the property covered by said plaintiff's mortgage; that said real estate was free from all liens except the lien of said judgment of Stearns and others and certain other judgments, set forth on page 20 of the bill, amounting to $5,777.49; that the value of said real estate over and above all liens and encumbrances was at least $28,000.00, exclusive of the property covered by the plaintiff's mortgage.

That although said Bowser, on the day that said Stearns judgment was rendered, was the owner in fee simple of said real estate, valued at $33,000.00, and also of the real estate covered by the plaintiff's mortgage, which was then worth $10,000.00 in cash at least,

449 that he also owned the undivided half of certain foundry property in Fort Wayne, his undivided interest being worth $30,000.00.

The bill then charges a conspiracy between Bowser and Bass, by which Bass was to bid in the several tracts of real estate belonging to Bowser, on execution sales under said judgment, for the benefit of Bowser; but, there having been no effort to prove this, the charge is abandoned, and it is not necessary to set it forth here.

The bill prays that the sheriff's sale of the premises covered by plaintiff's mortgage and the *alias* execution upon which it was made and the sheriff's deed to Bass may be declared void and set aside, and that Bass be decreed to hold his title to said mortgaged premises in trust for the plaintiff; that he be compelled to account for

the rents and profits from the date of the sale to the rendition of the decree in this cause, and for general relief.

450 *Abstract of the Answer of John H. Bass.*

The answer admits the execution of the notes and mortgage by Bowser to Smith, the assignment of the same, foreclosure of the mortgage by Milmine, and the purchase of the property, as set forth in the bill. He also admits the recovery of the Stearns & Co. judgment against Gardner, Blish and Co. as principals and Bowser and his partners as surities. He also admits small payments on the judgment; that interest was paid in advance from July 20th, 1876, to January 1st, 1877, in consideration of which the judgment plaintiffs agreed that no execution should be issued during that time; but he denies that such agreement operated to release Bowser and his fellow-surities. He admits the issuance of the execution on the Stearns judgment and the levy of the same on lots No-. 116 and 117
451 and the issuing of an *alias* execution, upon which a levy was made on the premises covered by the plaintiff's mortgage; but he denies that he, Bass, had anything to do, by way of direction or consultation, with the judgment plaintiffs or their attorneys concerning the same.

He admits that he knew that Milmine's foreclosure suit was pending, and that Milmine lived in Toledo, and he denies that he had anything to do with the publication of the notice of the sale in the Fort Wayne Sentinel.

The answer states, on information and belief, that Bowser, at the time the Stearns judgment was rendered, did not own all the real estate set forth in the bill, and that the value of some parts thereof is greatly overstated in the bill. He admits that he purchased parts of the real estate of Bowser on execution and tax sales.

The answer states that Bass had been for a long time an
452 accommodation endorser for the firm of Bowser & Co., composed of J. C. Bowser, Joseph R. Prentis, and Daniel M. Falls, giving the various items of indebtedness of said firm for which he was liable as endorser; that, on the 6th day of November, 1876, fearing that Bowser, Prentis and Falls would be unable to pay the notes, he procured Bowser to execute him a mortgage on certain lands which are set forth in Exhibit "A," filed with the answer; and on the 4th day of November, 1876, he procured Prentis and Falls to execute to him a mortgage upon their interest in the partnership property and certain other real estate which is set forth in Exhibit "B," filed with the answer; that before said mortgages were given Bowser had sold his interest in the lands and personal property, known as the foundry property, to McLachlin and Olds, and had taken as a part consideration seven notes of $2,000.00
453 each, which were deposited in bank as collateral security for the indebtedness for which Bass was surity and endorser; that the members of the firm of Bowser, Prentis and Falls were afterwards adjudged bankrupts; that some time in July, 1880, he paid off of the indebtedness of the bankrupt firm about $22,560.80.

He says that soon after the execution of the mortgages to him he caused an investigation to be made of the title of the lands embracing the mortgages, and found to his surprise that they were so encumbered that it was doubtful whether they would sell for enough to discharge the liens which were superior to his mortgage. On pages 6, 7, 8, and 9 of the answer the specific liens are set forth which were prior to the lien of the mortgages to Bass, being, as is alleged in the answer, a total of $43,092.91.

454 That he had but three courses open to him—first, to sit by and suffer his security to be exhausted in the satisfaction of prior liens; second, to advance the large sums necessary to redeem the prior liens, and, third, to attend the sales of such executions as might be issued by the several lienholders and protect his interest by bidding upon each piece of property sold, when necessary; that he adopted the latter course—attended every execution sale that came to his knowledge and bid upon the property—and that in so doing he was only seeking to protect his subsequent liens by preventing the sacrifice of the property of Bowser to prior liens; that he did not seek and did not have, as he believes, any advantage over any other bidder or creditor. On pages 10, 11, and 12 of the answer will be found a statement of the different purchases made by Bass on execution sales.

455 As to lots 116 and 117, upon which the Stearns & Co. judgment had been levied, the answer alleges that they were encumbered by the decree of foreclosure in the sum of $6,455.25 and costs in favor of one Hartmeyer. Said foreclosure was on a mortgage debt in December, 1872; that lot No. 117 was encumbered by a tax deed to one John Langhorn; that said lot 116 was also encumbered by delinquent county taxes—about $200.00—and that both of said lots were encumbered by delinquent city taxes to the amount of about $550.00.

Defendant says that when said lots were first offered for sale upon the execution in favor of Stearns he attended the sale, intending to bid for the same; but, upon ascertaining the amount of the encumbrances, he declined to bid, the encumbrances being more than he was willing to pay for the lots; that there was not sale for want of bidders, and that they were again offered on execution, but

456 were not sold for want of bidders. The answer also sets out, on page 14, a list of judgments against Bowser and others, amounting to over $5,000.00, which were prior to the lien of the Stearns judgment at the time the said lots were offered for sale under the Stearns judgment and executions. The answer admits the abandonment of the levy of the execution by Stearns & Co., the issuing of the *alias* execution, and the levy of the same upon the land covered by the Smith or Milmine mortgage; all of which the defendant says was done without any attempt on his part to control the acts of said Stearns and others or the sheriff.

He admits that on the 25th of January, 1878, he bought the Hartmeyer judgment and decree of foreclosure for less than the amount of it, and that on the 11th of February, 1878, he purchased

457 lot 116 at a tax sale for $211.48, and, there being no redemption, he took a deed for it November 20th, 1881; that in April, 1878, he paid taxes assessed by the city of Fort Wayne on said lots for the years 1873 to 1877, inclusive, amounting to the sum of $559.41. On the 7th of March, 1878, he purchased the title held by Langhorn under tax deed and took his quitclaim, and that he has paid taxes on said lots for the years 1878 to 1881, inclusive, amounting to $671.00; that he afterwards caused an order of sale to issue upon the decree of foreclosure assigned to him by Hartmeyer and bid the property in at sheriff's sale for $8,531.07, which, together with the tax liens, &c., made the cost of the lots to the defendant $10,209.34. He admits that he attended the sale of the property covered by the Milmine mortgage *covered by the Milmine mortgage* and decree on the 3rd day of August, 1878, and paid $2,000.00 for the same, and that at the expiration of the year
458 allowed for redemption, on the 17th of November, 1879, he took a sheriff's deed therefor.

The answer also avers that at the time of said last-mentioned sale the lands so sold to him were encumbered by a number of liens prior to the judgment upon which it was sold and which remains liens upon it in the hands of the defendant Bass after said purchaser. The amount of said liens was $6,591.43, as set forth by items on page 17 of the answer.

The defendant further avers that at the time of the sale of the lands on the Stearns judgment to him he had no actual knowledge of any payments upon the judgment; that since the beginning of the suit he has inquired and is informed and believes that there was paid by the plaintiff on December 31, 1873, $354.93; January 7, 1874, $145.07, and that after that interest was paid on the residue until January 1, 1877, and that there was due on said judg-
459 ment at time of the sales $1,971.06, besides costs; that there was endorsed on said execution a memorandum to the effect that interest had been paid to January 1st, 1877, but the two first payments, of $354.93 and $145.07, were not endorsed on the execution and did not appear on said judgments. The defendant denies expressly that he had any knowledge or notice that the execution was for a larger sum than was really due.

The defendant says that his appearance in the foreclosure suit by Milmine was entered on the first of July, 1878, and withdrawn on the 8th of July, 1878, on which last-named day a default was entered against him in the cause, and that the purchase by him of the lands in controversy on the Stearns execution was long after the default had been taken. The answer sets forth, on pages 19 and 20 and 21, the purchase of other parcels of real estate which were sold on executions against Bowser. The answer shows that all of
460 the property of Bowser, Prentis and Falls has been sold and disposed of upon mortgages and executions prior to the mortgages executed by them to indemnify him as the endorser for said firm, and that the defendant Bass has never foreclosed either of the mortgages executed to him for that purpose. The defendant further answers that he believes that all the purchases made by him on ex-

ecutions and foreclosure were regular and proper and duly issued on valid judgments, and that they were bought fairly and honestly and legally bid in and bought by him.

The answer specifically contradicts the averments of the bill that there is a conspiracy or arrangement between Bowser and Bass that Bass was to purchase and hold real estate for Bowser's benefit; but, as no effort has been made in proof to show such conspiracy, it is not necessary to give the averments of the answer
461 upon that subjectet.

There were answers filed by two of the other defendants, Bowser and Oppenheimer, but they are not matereal to the controversy in this case.

Abstract of the Evidence.

Stipulation No. 1 agrees that the facts stated therein are true, and that the statement contained in it may be read and used as a part of the evidence, provided the court shall deem the same relevant and materal to the issues. On pages 1, 2, and 3 of stipulation No. 1 will be found a schedule of the different parcels of real estate owned by Jacob C. Bowser and in which he had an interest.

It is admitted on page 3 of the stipulation that the complainant Milmine did not know of the release of lots 116 and 117 by Stearns and others from the levy of their execution issued on their
462 judgment, nor did he know of the levy by the same parties of their execution on the property mortgaged to him, nor the sale of the same to the defendant Bass, until long after the year for redemption had expired. On the same page there is a statement of the specific liens which were on said lots on July 6th, 1878, when they were released from the levy, said leins amounting to $8,008.63. It is also admitted that the mortgage of Bowser to Smith was duly recorded, as set forth in the bill, and that the defendants, Gardner, Blish and Co., paid interest on the Stearns judgment, at the rate of ten per cent., from the date of the judgment to January 1, 1877, part of which, viz., from July 20, 1876, to Jan. 1, 1877, was in advance and under an agreement that no execution should issue on the judgment until Jan. 1, 1877, and that no execution was issued thereon, because of said agreement, until after Jan., 1877.

Pages 5, 6, 7, 8, and 9 of the stipulation contain a statement
463 of the various executions issued against Bowser and others and the manner in which they are satisfied, by sale and otherwise, which it is not necessary to set forth here.

Stipulation No. 2 contains a letter addressed by Stearns & Co. to Bowser & Co., asking their consent to an extension of time on the Stearns judgment against Gardner, Blish & Co., with an endorsement on the back of it signed by J. C. Bowser & Co., which was written, as it was agreed, by J. C. Bowser; which endorsement is as follows:

"FORT WAYNE, *April* 13, 1875.

We agree to the within proposition as stated.

J. C. BOWSER & CO."

Said stipulation also says that Jacob C. Bowser was born April 8th, 1808, and married prior to 1860 to Delilah Bowser, who was born May 3, 1815, and who is still living and his wife.

Stipulation No. 3 contains a schedule of the mortgages and judgments that were liens upon the property of Bowser and Bow-
464 ser and Co. It also shows that the personal property levied on under the judgments of Kegg, Bloom and others, D. Shaw, R. Keen, and Ed. Ney were the same in each case, and that it consisted of three engines and certain shafting and connections, the whole of which was appraised at $2,500. It was offered for sale, remained unsold for want of bidders, and it was duly appraised at $310, and sold November 29, 1879, upon an execution issued in favor of Edward Ney, for $261.45.

John H. Farrar's First Deposition.

After the levy of the execution upon the lots No-. 116 and 117 I did all I could to find purchasers. I asked different persons, and talked to Mr. Bowser about it, and was anxious to sell it; did all I could. After repeated offers and failures to sell the property I conversed with some gentleman in the sheriff's office, whom I do not know, and he told me that there was a piece of land not far
465 from the city of Fort Wayne—possibly adjoining the corporation—that he believed would sell, and I made an examination and ascertained that it was covered by the Smith or Milmine mortgage, and I came to the conclusion that that would sell, and caused execution to be levied upon it.

The witness says he never talked with Bass on the subject of releasing the execution or of making the collection before the execution was levied. He had been to Fort Wayne and asked Mr. Bell in relation to these matters. After the levy had been made upon the land he looked for Mr. Bass; knew he was a man of means; asked him if he could buy that tract of land when it was offered for sale. He said he would see his attorneys, and did not give him any more satisfaction than that at that time. He says he never made any arrangements with Bass or any one representing him, or made any agreement by which he was to release the property levied upon
466 first and resort to the piece of property that was sold; never had any conversation with Bass on the subject. He says that whatever efforts were made were made by himself under difficulties. What he did was after exercising a good deal of care and diligence and solely for the purpose of collecting the debt without consultation with anybody, "that I remember now, except the man that I saw in the sheriff's office, who advised me in relation to this real estate." Mr. Farrar says he caused the execution to be issued himself in every instance personally, though he might be wrong about that. At one time he wrote to Mr. Stratton to have an execution issued. It might be that he did that more than once. "Stratton at that time said he had a judgment later than mine, and his interests were in some respects identical with mine. This single instance was

the only time I remember when we acted together, when I
467 requested him by letter to have an execution issued. I asked for the issuing of the *vendis.* that were issued. The levy on this Milmine land was ordered by myself and investigated by myself, and was done without anybody knowing it, save the gentleman I have spoken of. I am quite sure Mr. Stratton did not know it. I am quite sure Mr. Stratton did not know anything about the thing until the levy was made. I had two consultations with Mr. Stratton, and subsequently wrote to him."

John L. Farrar's Second Deposition.

I was the attorney of Stearns and Co.; was frequently about Fort Wayne to see about the collection of it; was in the sheriff's office and clerk's office; made some examination and made some inquiries about Bowser's condition. My impression was that this was after this first levy had been made on Bowser's property and it had
468 failed to sell. In this examination I learned of various tracts of land owned by Bowser. I talked to Mr. Bell, of the firm of Coombs, Bell and Morris, and Mr. Coombs, and asked them to help me find a purchaser, so that I could make the money on the judgment. I had three interviews with a gentleman I found in the sheriff's office and one with Bell, and I think Mr. Coombs was present. I was in Fort Wayne after the levy was made. I learned of the Smith and Milmine mortgage and judgment while I was trying to make the money out of the Bowser property. The witness states that he thinks the sheriff made the first levy without any direction from anybody, although he first stated that he thought he directed him to make the levy. He says he did the best he could to make the property sell, and failed, and then directed the sheriff to abandon the levy. It was after this that, for the purpose of finding some property that would be more likely to sell, *that* he made in-
469 quiry at the sheriff's and clerk's offices. I did not examine the records, but had a pretty clear idea of the condition of Bowser's property, and got the information from the gentleman spoken of, whom I believe to be a deputy sheriff and who seemed to be familiar with Mr. Bowser's matters. I examined sufficiently to satisfy myself that I could make the money out of the land covered by the Milmine mortgage. I was satisfied that there was no unencumbered property and took the only way to make the money on the Stearns judgment. I knew of no property of Bowser's at that time upon which I had a better right to levy. I did not understand enough of the assets and encumbrances to undertake to marshall the assets among the creditors. I acquired such a knowledge of the assets of Bowser as to satisfy me that I could make the money out of the property upon which I levied, and I had no such un-
470 derstanding as would enable me to marshall the assets in Bowser's matters, and that is the way in which I wish to be understood. The conversation I had with Mr. Bell was before I directed the levy.

Robert L. Stratton.

I was attorney for other parties holding judgments against Bowser and others, which I was trying to collect at the same time that Mr. Farrar was trying to collect the Stearns judgment. He and I acted in concert, he living in Peru and I at Fort Wayne. In persuance of that arrangement I think I ordered an execution or *vendi.* in his case at one time. I find from a præcipe that I ordered an execution on the 5th of July, 1878. My recollection is that there was a levy made on lots No-. 116 and 117 on the Stearns judgment, and an offer to sell. At two different times after we had the levy Mr. Bass told me and the sheriff, Munson, that if we put it
471 up for sale he would bid it in. I think at one of these conversations Mr. Farrar had nothing to do with it and was not present, and afterward Mr. Farrar was present at one or more conversations with Mr. Bass. Bass did not at either of these offers to sell bid in the property, as we expected he would, according to his promise.

The Bowser homestead was encumbered to the extent of $5,000.00, which was ahead of the other judgments—a prior lien to both judgments. That fact, with the further fact that the judgment I had did not waive appraisement, made it difficult to sell the Bowser homestead (lots 116 and 117).

Mr. Bass then said in substance to me that he or we would endeavor to get the Stearns judgment out of the way first, as that waived appraisement, and that we would endeavor afterward to find some way to make the judgment that I represented. I think he said, furthermore, on that occasion that he would try and find
472 some property that could be levied on by the Stearns judgment to advantage, and that he would try and induce Mr. Bowser to turn that out instead of the homestead property; and after that either the execution or the *vendi.* in the Stearns case was released or returned, I do not know which, unsatisfied, upon Mr. Bass' recommendation, and a new levy was made on the Stearns judgment on some land in this county, which, if I recollect right, was suggested or pointed out by Mr. Bass.

I do not know that I can explain how we came to talk and negotiate with Bass, unless it was because he had a blanket mortgage, covering most of the Bowser real estate, for a large sum of money, and either he came to the sheriff or myself prior to his offers for sale on my execution. My best recollection is that he came to the sheriff, and then to me first. My recollection is that the home-
473 stead property was offered for sale once on my judgment, or twice, and once on my judgment and the Stearns judgment together or at the same time, and it may have been offered once on the Stearns judgment alone. There was no bid at either of these offers. I think there was some tax incumbrance on the property besides the liens I have mentioned. Bass may have given these incumbrances as a reason why he failed to bid, but I do not remember that he did.

I had one or more conversations with Bass in which he spoke of having got that execution levied upon a piece of land upon which there was a subsequent mortgage then being foreclosed by Mr. Withers as attorney. My recollection is he said it was the Milmine mortgage, and that by that means he would get ahead of that mortgage, as the Stearns judgment was a prior lien. There were other conversations, in which he made substantially the same statements,
474 and at these conversations he congratulated himself on the stroke of policy by which he had got ahead of that mortgage. I had several conversations with Bass, in which he said one or more times that he thought he had cut out the Milmine mortgage by the purchase of the real estate in the Stearns judgment, and that Milmine and his attorney, Withers, had not discovered its purchase under the Stearns judgment until it was too late to help themselves, and he did not know what they were going to do about it or what they could do about it.

John H. Bass.

I had nothing whatever to do with the release of the levy on the execution of the Stearns judgment upon lots 116 and 117 or the subsequent levy upon the lots finally sold on that execution. I made no arrangement or contract or agreement with the execution plaintiff or with their attorneys or with anybody represent-
475 ing them or either of them with reference to such release before the levy upon the property which was finally sold. I gave no directions for the reason that I did not feel that I had any right to.

I had some conversation with Mr. Stratton regarding the sale of this homestead property (lots 116 and 117); perhaps said to him at one time that I would bid upon that property when it was levied upon. At that time I did intend to bid upon it, but, upon ascertaining that there were prior liens to such an extent, that I felt it pretty unsafe to bid upon, both the liens then existing. I consequently declined to bid upon it at all. I do not think I ever made any statement to Mr. Stratton that I had procured levy to be made upon the lands finally sold. I do not remember of suggesting that that particular property should be levied upon. I may have suggested that that or other pieces of property that were levied
476 upon by judgments that were prior to my mortgage; that I would have to bid what I could safely bid upon them in order to get the judgment out of the way. My intention was to bid all that I was willing to pay for any property that was levied upon by executions prior to the mortgage I held until they were cleared out, and either get the property or else a fair valuation and let somebody else have it. It was only my desire or wish to bid any of it in if it would bring its fair value. I do not remember any conversation to the effect that I was glad I had got a title to this land or in the way of exultation that others had not found it out, although it is possible I may have stated that I had obtained a deed to the property. I may have laughed at the idea of them letting the prop-

erty go without redemption. Of course, I expected it to be redeemed. I did nothing to conceal the fact that this execution
477 had been levied upon the property, and that it was offered for sale and had been sold prior to the time of the expiration of the period of redemption. I think I never suggested to any person that any concealment be made or any rules [ruse] be resorted to to accomplish such result.

I do not say that I have no recollection of talking with Mr. Stratton about this matter. I had talked with him. I do not remember any conversation regarding the release of the execution. I did not know that he and Farrar were moving together in the matter. I know at one time—about the time of the sale of the homestead property—that Mr. Farrar was here. I believe I saw the two together, but I do not know how close their arrangements were. I did not tell Mr. Stratton that I would have that Stearns matter got out of the way, and that I would then make some arrange-
478 ment so his matters could be settled. I was endeavoring to have the judgments prior to the mortgage got out of the way by sales of the property. I had no control of the executions. I only bid upon the property when it was offered for sale. I was very much in hopes it would sell for enough to pay all the old judgments and let me get a little on my mortgage on some of that property, which I have not got and have but little hopes of ever getting.

Jacob C. Bowser.

I am 75 years old. I recollect the judgment of Stearns and others against Gardner, Blish and Co. and myself and Prentis and Falls as sureties. There were three or four payments. I think our firm paid about $400.00 on the Stearns judgment. I may be mistaken, it was so long ago. (The witness is shown Judgment Docket
479 No. 8 of the Allen circuit court, page 45, and, examining the receipts attached, he says:) That writing on the back of one of them is in my handwriting: "Stearns & Co.'s receipts, amounting in total to $500.00, paid on the judgment." The amount of the receipts is correct. (The receipts are attached as exhibits to his depositions.) The amounts stated in those receipts are correct, to the best of my recollection.

Daniel M. Falls.

Was a member of the firm of J. C. Bowser and Co. I was never consulted about nor consented to any extension of time being given to Gardner, Blish and Co. for the payment of the judgment upon their paying interest in advance. During the year 1876 I owned property subject to execution in Allen county to the value of $2,000.00, owning a lot in Bloomingdale and a piece of land in Adams
480 township containing about 60 acres. The Bloomingdale lot was worth from $150 to $200. I took the land at $700. I never took any part in the management of the financial affairs of the firm of Bowser & Co.

Jacob J. Kern.

Deputy clerk of Allen county. I have examined the Exhibits No. 1, 2, 3, 4, and 5, attached to my deposition. I have compared them with the original executions on file in the clerk's office. They are copies of the several executions and *vendis.* mentioned in the plaintiff's complaint as issued on the judgment, together with the endorsements now appearing thereon and the sheriff's return endorsed thereon. The executions and the clerk's endorsements thereon were written by John Flemming. I do not know who wrote the written portions of the *vendis.* and executions. The written part on the back of the *fi. fa.* No. 9160 are in the handwriting
481 of John Fleming; also that which is written on *fi. fa.* No. 9351 is in John Fleming's handwriting. The copies of the receipts on the judgment docket opposite the judgment of Stearns and others against Gardner and others are in the handwriting of John Fleming. The file-mark, "Filed Oct. 12, 1876," on the back of the receipt dated July 20th, 1876, is in John Fleming's handwriting. I was deputy clerk at the time.

The receipt for $354.93, dated Dec. 31, 1873, and the one for $145.07, dated Jan. 7, 1874, pasted in the judgment docket, are both one piece of paper and each marked in red ink across the face with the word "duplicate." John Fleming ceased to act as deputy about Nov. 4, 1878. The paper on which the two receipts are written was pasted in either at the time or before the one on which the words "Filed Oct. 12, 1876," appear.

The paper containing the two receipts is attached to the judgment docket by gum or glue, covering about a half of an
482 inch in breadth of the upper half of the left-hand margin of the paper, and the receipt dated July 20, 1876, is pasted or fastened with glue or gum, covering about an inch of its left-hand mortgage [margin], and the gummed portion of the last-mentioned receipt laps over the gummed margin of the first-mentioned paper and extends a short distance above, on the surface of the docket.

F. H. Wolke.

I was clerk of the Allen circuit court in 1878. I had custody of the books of that court. (Witness is shown *vendi.* No. 9764, in the case of Stearns *vs.* Gardner and others, and says:) The written part of it is in the handwriting of John H. Fleming. He was deputy clerk during the entire term of my office. His duties were general about the office, and he issued fee bills, executions, &c. The custom was, in the office, to indorse the receipts or papers on the back
483 by filing them, with the date they were brought in, and pasting them in the judgment docket. My instructions were to file all such papers, with the date they came in, and to paste them in the judgment docket opposite the case to which they applied. The endorsements on the back of the *fi. fa.* No. 9160 of credits $354.93 and $145.07 and interest paid to Jan. 1, 1877, are in the

handwriting of John Fleming. My instructions were in issuing executions to endorse on the back the several payments which the judgment docket showed, with the date and the amounts.

There is a filing upon the receipts dated Peru, Ind., July 20, 1876. There is no filing on the others. The endorsement of these words, "Stearns and Co., two receipts, amounting in total to $500, paid on judgment," is in the handwriting of J. C. Bowser. John Fleming was careful and accurate in the discharge of his
484 duties. The receipt dated July 20, 1876, was filed in my office October 12th, 1876. I have no knowledge or means of knowledge as to when the other receipts were filed in the office or pasted in the docket.

AS TO THE VALUE OF BOWSER'S REAL ESTATE.

Isaac D'Issay.

Age, 44; residence, Fort Wayne; has been a real-estate dealer nine years. He gives the following values:

Lot	17,	in	1883	worth	$350;	in	1877	and	1878, $300.
"	18,	"	"	"	375;	"	"	"	" 325.
"	31,	"	"	"	425;	"	"	"	" 375.
"	34,	"	"	"	350;	"	"	"	" 300.
"	39,	"	"	"	325;	"	"	"	" 275.
"	40,	"	"	"	300;	"	"	"	" 250.
"	41,	"	"	"	425;	"	"	"	" 375.
"	42,	"	"	"	375;	"	"	"	" 325.
"	43,	"	"	"	325;	"	"	"	" 275.
"	44,	"	"	"	325;	"	"	"	" 275.
"	45,	"	"	"	350;	"	"	"	" 300.
"	46,	"	"	"	350;	"	"	"	" 300.

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Lot	47,	in	1883	worth	$325;	in	1877	and	1878, $275.
"	48,	"	"	"	325;	"	"	"	" 275.
"	49,	"	"	"	325;	"	"	"	" 275.

Joseph W. Edsall.

Age, 29; real-estate agent; in Fort Wayne. Lots 116 and 117 in 1883 are worth $12,000; in 1878, $60 per front foot.

Lots 17, 18, 31, 34, 41, 42, 43, 44, 45 were worth $400 apiece in 1883.

G. L. Bittenger.

Age, 45; am an attorney and real-estate agent; residence, Fort Wayne. Lots 116 and 117 in 1883 were worth $16,000.

S. F. Swayne.

Age, 37; business, law, insurance, and real estate. Lots 116 and 117 were worth $100 a foot in 1883, and the same in 1878; lots 17

and 18 were worth $400 to $450 apiece in 1883; lot 31, $450;
486 lot 34, 300; 39 and 40, from $600 to $650, together; lots 41 to
49, inclusive, were worth $300 apiece. These lots are worth
20 per cent. more now than they were in 1878.

H. H. Bossler.

Age, 59; real-estate agent; Fort Wayne. Lots 116 and 117 were worth $12,000 in 1883, and the same in 1877 and 1878. In 1883 lot 17 was worth $500; lot 18, $500; 31, $350; 34, $350; 39, $350; 40, $400; 41, $350; 42, $300; 43, $300; 44, $300; 45, $350; 46, $350; 47, $300; 48, $300; 49, $300; total, $5,000. The- were worth the same in 1877 and 1878.

Sydney C. Lumbard.

Age, 34 years; real-estate and insurance agent; Ft. Wayne. Lots 116 and 117 were worth $12,000 in 1883; the same in 1878; lots 17, 18, 31, 34, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, and 49, $400 apiece in 1883, and the same in 1878; lots 116 and 117, en-
487 cumbered as it was, would have sold at sheriff's sale, from 1867 to 1882, at from $8,000 to $12,000. I have known sales in the vicinity of these lots at higher figures than I have fixed.

K. J. Bauer.

Age, 33; real-estate agent. Lots 116 and 117 were worth $100 a front foot in 1883; in 1877–'8, $80 a front foot; lot- 17 and 18, $600 apiece; lot 31, $650; 34, $600; 39, $400; 40, $450; 41, $500, and 42 to 49, inclusive, $450 apiece in 1883.

Herman Michael.

Real-estate agent. Lots 116 and 117 were worth $100 a foot in 1883. In 1877–'8 the two were worth about $10,000. The site of the Presbyterian church, in the same neighborhood, was sold for $25,000, and lots have sold within a square and a half of the
488 Bowser lots at $70 a front foot. In 1883 lot 17 was worth $500; 18, $500; 31, $600; 34, $450; 39, $400; 40, $350; 41, $350; 42, $300; 43, $300; 44, $300; 45, $350; 46, $350; 47, $300; 48, $300; 49, $300. The same in 1877–'8.

The S. half S. W. quarter, S. 8, T. 30, R. 13 E.; also the east half N. W. quarter, S. 17, T. 30, R. 13, except 10 acres and railroad right of way, and also all that part of the west half of the N. W. quarter, S. 17, T. 30, R. 13, which lies north of the Ohio and Indiana Railroad Co. was worth about $75 per acre, and about the same in 1878. Witness says he does not know whether the land is improved, or high or low or wet or dry.

David C. Fisher.

Age, 33 years; real-estate agent; Fort Wayne. Lots 116 and 117 were worth $100 a front foot in 1883, and the same in 1878; lot 17

was worth $500; 18, $500; 31, $600; 34, $450; 39, $400; 40,
489 $350; 41, $350; 42, $300; 43, $300; 44, $300; 45, $350;
46, $350; 47, $300; 48, $300; 49, $300. They were worth about 10 per cent. less in 1877–'8 than in 1883.

Andrew F. Gluting.

Age, 29 years; real-estate and insurance agent; Ft. Wayne. Lots 116 and 117 were worth $100 a front foot in 1883. In 1877–'8 they were worth $80 a front foot. Lot 17 was worth $500 in 1883; 18, $500; 31, $600; 34, $450; 39, $400; 40, $350; 41, $350; 42, $300; 43, $300; 44, $300; 45, $350; 46, $350; 47, $300; 48, $300; 49, $300. I think they were worth about 25 per cent. less in 1877–'8. The property described in Michael's evidence is worth $75 an acre, and was worth 10 per cent. less in 1877–'8.

Conrad Dannenfelser.

Age, 64; farmer; am acquainted with S. half of S. 27 and
490 the fractional N. W. quarter of S. 34, T. 31, R. 13, being about 434 acres. This land was worth in 1878 $50 per acre and $30 per acre now. The destruction of timber has caused the decrease in value.

Henry Young.

Age, 42; knows the same land; it was worth $50 per acre in 1878 and $30 per acre now.

Frederick Gerke.

Age, 50 years. Testimony the same in regard to the land.

Anthony Kohlmeyer.

Age, 52. In regard to same land gives the same testimony.

John H. Bass.

I have sold timber to the amount of $8,600 off of the land
491 above described. The bulk of the land was in St. Joe township from which this timber was taken.

William B. Abbott.

Farmer; 57 years old. The following land, S. half of S. half, S. W. quarter, S. 8, in Adams township; also the E. half N. W. quarter, S. 17, and all that part of the west half N. W. quarter, S. 17, lying north of the P., Ft. Wayne and C. Railway, being 121 acres, is worth $300 per acre. In 1878 this land, for farming purposes, was worth $75 to $80 an acre. Its nearness to the city and its close proximity to what will be a railroad town has made it valuable, in my estimation.

Simon Edsall.

Age, 74. In regard to same property. I lived adjoining it 46 years. It is worth $200 an acre.

492 *Clarence W. Edsall.*

Age, 34 years. Same land worth $250 per acre.

Louis S. Maples.

Age, 59. The E. half S. E. quarter, S. 32, T. 30, R. 14, was worth about $28 per acre in 1878.

That part of the W. half S. E. quarter that lies south of the town of Maples; the S. W. quarter S. 32 and that part of the S. E. quarter that lies north of the railroad and the S. half of the S. half of the N. E. quarter of S. 32, being 239 acres, was worth about $28 per acre in 1878.

Lot 9, in the town of Maples, is worth $10; lot 10, $100; 13, $100; 20, $10; 31, $20; 35, $10; 36, $5.

Lots 1, 2, 3, 4, 5, 6, and 7, in the First Ad. Maples, are worth $1,000. Lots 1, 2, 3, 4, 9, 11, 12, 13, 15, 16, 17, and 18, Second Ad. Maples, are worth $6.00 apiece. E. half S. W. quarter, S. 33, T. 30,
493 R. 14, are worth $28 an acre.

The record of the title of some of these lots was very complicated. Bowser originally had an undivided one-fourth part of them. All the lots in section 32, and an undivided $\frac{1}{12}$ of 51 acres in section 33, and the fourth part of 54 acres in section 5, and then a one-fourth interest in all the rest—at the time these lots were sold to Bass I do not think Bowser's undivided interest in these fractional pieces was worth more than $15 an acre.

Niel McLachlin.

Age, 64; boiler-maker; live- in Fort Wayne. I know what is called the Bowser foundary property, in Fort Wayne. It was worth $60,000 in 1876, without the stock. I examined it at the time we purchased it to see what it was worth. I and C. L. Olds pur-
494 chased an undivided half of the whole real estate, machinery, and patterns about June, 1876, for $30,000. That was a fair value at that time.

Charles L. Olds.

Age, 29; Fort Wayne; manufacturer. McLachlin and I purchased that property—a part of it—from Mr. Bowser about June, 1876. We paid Bowser $30,000 for his half interest; $11,000 cash. We assumed some incumbrances and had time on the balance. We bought the same half over again from Bass that we bought of Bowser, on the same terms, less the previous payments. There was about $14,000 coming to Bowser outside of the encumbrances we assumed.

We have not paid it in full. Bass bought the foreclosure of the mortgage. It was the understanding that if he should secure a title to the property we should have the right of purchasing from
495 him at a fair valuation, and that was the agreement that was carried out in 1878. We were on the point of bringing suit against Bowser for what we had paid him and for the restitution of our notes, on the ground that the title of the property was encumbered. Mr. Bass still owns the other half of the property purchased at the sale. (The contract between McLachlin and Bass and Olds is in writing and is marked Exhibit A.)

J. D. McHenry.

Age, 48; live at Maples. The Bowser and Bass land in and about Maples, being about 330 acres, I would say is worth $25 an acre; lot 10 is worth $150; lot 13, $150; lot 20, $25; 31, $25; 35, $20; 36, $10; lots 1, 2, 3, 4, 5, and 6, in the First Addition, I bought at about $2,000 altogether. There are seven dwelling-houses, barns,
496 &c., upon them. Lots 1, 2, 3, 4, 9, 11, 12, 13, 15, 16, 17, and 18, in the Second Addition, being vacant lots, are worth $10 apiece, and lot No. 9 is worth $75. (Witness says he fixed the price in view of the difficulties in the title.)

John H. Bass.

As to the value of the Maples property, the title to all that property of Maples is very mixed up and uncertain. The Maples lots are not worth any more than ordinary farming land, and I would much prefer to have them that way. I bought several of them at a small price, knowing at the time that the lots had been sold to other parties and some houses built upon them, when they were intended to be properly conveyed at the time, but as a matter of fact they were not.

My object in buying them was to let them refund me the
497 money I had paid out and then give them a perfect title, which I intended to do.

Report.

The issues in the case have been simplified and reduced to a few points. It was conceded, in argument before the master, that the evidence does not support the allegations of the bill, which charged that Bass and Bowser entered into a conspiracy, in pursuance of which Bass was to buy in Bowser's property on execution and hold it for Bowser's benefit.

The questions involved, as stated on page 4 of plaintiff's brief, are as follows:

First. Did not the levy upon lots 116 and 117 render void the subsequent levy of the execution issued on the same judgment upon the land in controversy?

Second. Was not the levy of the Stearns execution upon
498 the land in controversy void as to all parties with notice, made as it was in violation of the clear equities of the plaintiff, while other lands of ample value to make the execution were liable to the judgment lien?

Third. Did not the extention of time by the original judgment creditors discharge the land in controversy from the judgment lien?

Fourth. Did not the issuing of the execution upon which the land was sold for a larger amount than was due thereon, with the intent to collect this excess, render the execution and sale thereon to Bass void?

The question most elaborately discussed at the hearing was the first one. State and Federal authorities are numerous in support of the proposition that a levy of an execution upon personal property sufficient to satisfy the execution operates *per se* as a *prima facie* extinguishment of the judgment; but the Federal decisions,
499 as well as the decisions of nearly all the State courts, concur in holding that the rule does not apply in case of a levy of an execution upon real estate. Beginning with 1 Blackford and continuing in an unbroken current of decisions down to the present time, the supreme court of Indiana has held that a levy upon either personal or real estate of sufficient value to satisfy the execution operates *prima facie* as an extinguishment of the judgment. In Frank *vs.* Brasket, 46 Ind., 96, Judge Downey states the Indiana doctrine as follows:

"It is settled that a levy upon real or personal property sufficient to pay the execution operates as a satisfaction until such levy is legally disposed of by the sale of the property or in some other legal manner."

Are the Indiana decisions to control in a controversy such
500 as this in a Federal tribunal? The master is inclined to the opinion, and therefore reports and finds, that the law upon this question, as settled by the supreme court of Indiana, has become a rule of property which is binding upon Federal courts. It seems to be conclusively shown by the reasoning of Judge Clifford in United States *vs.* Dashiel, 3 Wal., 688, that the reasons for the rule, as applied to a levy upon personal property, do not apply to the case of a levy upon real estate. In this case the master feels bound to follow the Indiana decisions. The following facts are not disputed:

May 12, 1873, Stearns and Co. recovered a judgment in the Allen circuit court against Gardner, Blish and Co., principals, and Bowser, Prentis and Falls, as sureties, for $2,212.85. At that time Bowser
501 was the owner of a number of parcels of real estate situated in Allen county, which was then worth from $20,000 to $30,000.

At the date of the recovery of the Stearns judgment there were other judgment liens upon Bowser's property in Allen county amounting to about $6,000.

December 31st, 1873, the principal debtors, Gardner, Blish and Co., paid on the Stearns judgment $354.93.

January 1, 1874, the same parties paid $145.07.

May 1, 1874, the principal debtors paid the interest on the judgment up to May 1, 1874.

June 20, 1876, the principal debtors paid all the interest then due and to become due on the judgment up to the first of January, 1877.

The interest so paid in advance was at the rate of 10 per cent. per annum upon the agreement between the plaintiffs and the principal debtors, that the day of payment should be extended
502 to January 1, 1877. Before granting the extention last named the judgment plaintiffs wrote to Bowser and Co. (composed of Bowser, Prentis and Falls), at Fort Wayne, asking their approval for such payment of the interest and the extension. That letter is filed as a part of stipulation No. 2. On the back of the letter is the following endorsement: "Fort Wayne, April 13, 1875. We agree to the within proposition as stated. J. C. Bowser and Co." It is agreed that this endorsement was in the handwriting of and signed by Jacob C. Bowser.

June 12, 1877, Stearns and Co. caused execution to issue on the judgment which was levied on lots 116 and 117, in the original plat to the city of Fort Wayne, being Bowser's property. The writ commanded the sheriff to make the sum of $2,212.85 and costs and interest. There was then due on the judgment according to de-
503 fendants' computation $1,971.06, and according to plaintiffs' computation the sum of $1,552.05. The sheriff levied the executions upon lots 116 and 117, advertised and offered the lots for sale on July 21, 1877, and returned, "Not sold for want of bidders."

October 9, 1877, the judgment plaintiffs caused an execution to issue upon the same judgment, which was returned by the sheriff October 25, 1877, as having been served upon the principal judgment defendants, but that no property could be found whereon to levy.

November 26, 1877, the judgment plaintiffs caused a *vendi.* to issue upon said judgment, in which was recited the former levy upon said lots 116 and 117, and ordered the sheriff to sell said propesty.

December 22, 1877, the sheriff returned that he had advertised the sale, but had made no sale for want of bidders.

504 July 5, 1878, plaintiffs caused a second *vendi.* to be issued requiring him to sell the same lots.

July 6 the following endorsement was made upon said last-named writ or *vendi.*: "This execution is returned unsatisfied; the within levy released. The clerk will please issue *alias* execution. July 6th, 1878. (Signed) C. A. Munson, sheriff, by Platt J. Wise, deputy."

It is an admitted fact that the action of the sheriff in returning the writ releasing the levy and abandoning the execution was by the express direction of the attorney of the judgment plaintiffs.

The *alias* execution was issued and the lands in controversy were levied upon in pursuance thereof, and the premises were sold to John H. Bass, the defendant, August 3, 1878, for $2,000.

After the lapse of a year allowed for redemption Bass took
505 a sheriff's deed, and took and still holds possession thereunder.

Plaintiff claims title to the same land under a decree of foreclosure made in his favor by the superior court of Allen county July 24, 1879, for $6,838, which decree was rendered upon a note executed by Jacob C. Bowser and wife June 1, 1875, to one Smith, the assignor of the plaintiff.

The sale to Bass upon a judgment older than the mortgage under which the plaintiff claims gives Bass the better title if the sale to him was valid.

That sale was not valid, in the master's opinion, if the value of the property levied upon under the execution issued upon the Stearns judgment was sufficient to satisfy or pay a substantial part of the judgment. The different writs in the hands of the sheriff authorized him to sell property without relief from valuation
506 or appraisement laws. It is argued for the defendant that the fact that several ineffectual offers had been made to sell the property at sheriff's sale warranted a release and abandonment of the levy.

It is also insisted that the evidence establishes the fact that prior encumbrances which were specific liens upon lots 116 and 117 were equal in amount to the value of the lots, and that they were worth nothing for the purposes of the Stearns execution. The amount of these specific liens was $9,286.55. What was the value of lots 116 and 117? The defendant introduces no evidence upon this point. One of the plaintiff's witnesses puts the value at $7,200 in 1878, three at $9,600, one at $10,000, three at $12,000, and one, without fixing the time, estimates them to be worth $1,600. The master is of opinion that they were worth at least $10,000, and prob-
507 ably $11,000. Upon this question the master reports that the levy upon lots 116 and 117 had not been disposed of in any legal manner when the levy was made upon the real estate covered by the Milmine decree; that Bass knew of the levy, and that it had been abandoned without having been legally deposed [disposed] of, and that he made his purchase of the land in controversy with the full knowledge of all the facts pertaining to the issuance and disposal of the writs issued upon the Stearns judgment.

It further appears in the testimony of Robert L. Stratton, who was an attorney representing other judgments against Bowser and others, that Bass had promised to bid on lots 116 and 117 when they were offered for sale on the Stearns judgment. Bass admits that such had been his intention at on- time, but, upon ascertaining
508 that there were prior liens, he felt it unsafe to bid and declined to bid upon them. Mr. Stratton further states that Bass told him that "he or we would endeavor to get the Stearns judgment out of the way first;" "that he would try and find some property that could be levied upon by the Stearns judgment to advantage, and that after that the execution or the *rendi.* in the Stearns case was released or returned unsatisfied, upon Bass's recommendation, and a new levy was made on the Stearns judgment on the land

in controversy." Mr. Stratton says he had one or more conversations with Bass in which he spoke of having got that execution levied upon the piece of land upon which there was a subsequent mortgage then being foreclosed by Mr. Withers as attorney, and that
509 Bass said it was the Milmine mortgage, and that by that means he would get ahead of that mortgage, as the Stearns judgment was the prior lien; that in several conversations Bass said that he thought he had cut out the Milmine mortgage by the purchase of the real estate on the Stearns judgment, and that neither Milmine or his attorney had discovered its purchase until it was too late to help themselves.

Mr. Bass is explicit in his denial that he made any arrangement or contract or agreement with the execution plaintiff- or with anybody representing them or either of them with reference to such release before the levy on the property which was finally sold. He admits that he had some conversation with Mr. Stratton on the subject of the sale of lots 116 and 117, but he does not think he made a statement to Mr. Stratton that he procured a levy to be made upon
510 the lands finally sold. He says he may have suggested that or other pieces of property that were levied upon by judgments that were prior to his mortgage; that he would have to bid what he could safely bid upon them in order to get the judgments out of the way. He denies that he told Mr. Stratton that he would have that Stearns matter got out of the way and he would then make some arrangement so his matter could be settled. He would endeavor to have the judgments prior to his mortgage got out of the way by sales of the property.

To explain Mr. Bass's relation to this business it is proper to state that he, as endorser and surity for the firm of Bowser & Co., had become liable to pay and had paid a large amount of money, and to indemnify him against loss Bowser and Bowser & Co. had
511 given him a blanket mortgage on all Bowser's property. This mortgage was junior to the Milmine mortgage and the Stearns judgment, as well as many other judgments which were liens upon Bowser's property.

Mr. Bass had a perfect right to attend the sales and bid as he saw fit, with a view to protecting his own interests; but to allow him to succeed in his efforts to cut out the Milmine mortgage would be, in the master's opinion, grossly inequitable. The master is inclined to the opinion that the testimony of Mr. Stratton as to Mr. Bass's agency in procuring the release of the levy on lots 116 and 117 and the levy of the *alias* execution upon the land covered by the Milmine decree is substantially correct, and that though Mr. Bass's conduct may have seemed perfectly fair to him as a business matter it was not such as should meet the approval of a court of equity.

512 The master further reports and finds that the judgment plaintiffs did grant an extension of time to the principal defendants in the Stearns judgment upon the payment of interest in advance, at the rate of 10 per cent. per annum, from June 20, 1876, to January 1, 1877, and that said extension was granted with the consent

of Jacob C. Bowser, but without the consent of his co-surities, Prentis and Falls.

The master also reports and finds that the execution under which the sale of the land covered by the Milmine mortgage was made to Bass, which was issued July 6, 1878, called for the collection of $2,212, with interest from January 1, 1877, which was $241.94 in excess of the amount then due upon said judgment.

The master does not understand that it is seriously insisted that the defendant Bass was bound by the decree rendered in the
513 Milmine foreclosure suit after Milmine filed his supplemental complaint, in January, 1879. At the time the Milmine suit was commenced Bass was the holder of a junior mortgage on the same land described in the Milmine mortgage. Milmine's original complaint alleged that Bass was the holder of a junior lien. This suit was commenced June 5th, 1878. July 1 Bass, by Coombs, Bell and Morris, as attorneys, appeared to the action and, ascertained that the allegation of the complaint as to priority of the Milmine mortgage was true, withdrew from the case, and a default was entered against Bass. Bass purchased the real estate covered by the Milmine mortgage under the Stearns judgment August 3, 1878, twenty-eight days after he had been defaulted in the Milmine foreclosure suit. That default having occurred long before he was
514 clothed with his new rights by virtue of the purchase under the Stearns judgment cannot be held to have been conclusive upon such after-acquired rights.

The foregoing was submitted to counsel for complainant and defendants for suggestions and has been returned. I now present it as my report.

Respectfully submitted.

WILLIAM P. FISHBACK, *Master.*

And afterwards, to wit, in vacation of said court, on the 20th day of November, A. D. 1885, the following further proceedings in the above-entitled cause were had, to wit:

Comes now John H. Bass, one of the defendants in the above-entitled cause, by R. S. Taylor, Esq., his solicitor, and files herein his exceptions to the master's report in the words following, to wit:

Comes now John H. Bass, one of the defendants in the above-
515 entitled cause, and makes exception to the report of the master in chancery of this court, to whom this cause was referred to take the proofs of the respective parties and report his conclusions of fact and of the law thereon by an order of this court made on the — day of ——, and which report, executed in compliance with said order, was filed on the 31st day of October, 1885, and assigns the following grounds of exception, to wit:

1. For that said master has found that the decisions of the supreme court of the State of Indiana to the effect that the levy of an execution upon real estate of sufficient value to pay the same is *prima facie* a satisfaction of such execution are binding upon Federal courts in Indiana, and should be followed by this court in dis-

regard of the contrary rule laid down by the Supreme Court of the United States.

516 2. For that said master has found as matter of law that the sale made to the defendant Bass was not valid if the value of the property levied upon under the execution issued upon the Stearns judgment was sufficient to satisfy or pay a substantial part of the judgment.

3. For that said master has found that lots 116 and 117 in the original plat of Fort Wayne were worth when levied upon under the Stearns execution at least $10,000 and probably $11,000.

4. For that said master has found that the levy on lots 116 and 117 had not been disposed of in any legal manner when the levy was made upon the real estate covered by the Milmine decree.

5. For that said master found that Bass knew of the levy on lots 116 and 117, and that it had been abandoned without having been legally disposed of, and that he made his purchase of the

517 land in controversy with the full knowledge of all the facts pertaining to the manner of the issuance and disposal of the writs issued upon the Stearns judgment.

6. For that said master found that to allow him (Bass) "to succeed in his effort to cut out the Milmine mortgage would be grossly inequitable."

7. For that said master found that "The master is inclined to the opinion that the testimony of Mr. Stratton as to Mr. Bass's agency in procuring the release of the levy on lots 116 and 117 and the levy of the *alias* execution upon the lands covered by the Milmine decree is substantially correct, and that though Mr. Bass's conduct may have seemed perfectly fair to him, as a business matter it was not such as should meet the approval of a court of equity.

8. For that said master found that the sum of $2,212,

518 with interest from January 1, 1877, for which execution was issued on the Stearns judgment July 6, 1878, was $24,494 in excess of the amount then due on said judgment.

Whereas said master should have decided and reported:

1. That as matter of law the rule laid down by the Supreme Court of the United States with respect to the effect of a levy of an execution as satisfaction thereof is the rule to be followed by this court in preference to a contrary rule laid down by the supreme court of Indiana.

2. That as matter of law a levy on real estate is not, *per se*, any ratification of the execution or judgment.

3. That as matter of fact said lots 116 and 117 on the original plat of Fort Wayne were worth, clear of all encumbrances, less than $10,000 from the time they were levied on under the Stearns execution until the levy was abandoned.

519 4. That as matter of fact said lots 116 and 117, subject to the then existing prior specific liens upon them and subject to the contingent interest of Delilah Bowser, the wife of Jacob C. Bowser, were not worth enough to satisfy the Stearns execution.

5. That as matter of fact said lots 116 and 117, subject to prior

specific liens and the contingent interest of Mrs. Bowser, and the then existing prior general liens on the property of Jacob C. Bowser, were not worth enough to satisfy the Stearns execution.

6. That the repeated efforts made by the sheriff to sell said lots 116 and 117 exhaus-ed the remedy of Stearns and Co. against them, and would have entitled said Stearns and Co. to an order of court on application setting aside the levy on said lots.

520 7. That the abandonment of said levy on lots 116 and 117 without any order of court was, at most, but an irregularity of proceeding not sufficient to invalidate a subsequent sale on *alias* execution.

8. That the sale made by the sheriff of Allen county to John H. Bass on the 3d day of Aug., 1878, of the land in dispute under the *alias* execution issued on the Stearns judgment, was not, by reason of the former and abandoned levy on said lots 116 and 117, void.

9. That the act of said Bass in buying the land in dispute at sheriff's sale, as he did, was not unjust or inequitable toward the plaintiff.

10. That the defendant Bass made no effort and did no act "to cut out the Milmine mortgage."

11. That in respect to the alleged agency of the defendant Bass in procuring the release of the levy on lots 116 and 117 and the levy of the *alias* execution upon the land conveyed by the

521 Milmine decree, the allegations of the answer are supported by the evidence.

12. That there was due on the Stearns judgment at the time of the sale to Bass of the land in dispute the sum of $—.

13. That the averments of the bill are unsupported by the evidence.

14. That the facts, the law, and the equity are with the defendants.

Wherefore said defendant excepts to said report and asks the judgment of the court thereon.

COOMBS, BELL & MORRIS &
R. S. TAYLOR,
Solicitor- for Def't.

And afterwards, to wit, at the December term of said court, on the 14th day of December, A. D. 1886, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

522 Comes now George Milmine, plaintiff, and John H. Bass, Jacob C. Bowser, Charles A. Munson, Harmon E. Stearns, Charles F. Stearns, and Moses Oppenheimer, defendants, by their several solicitors.

And this cause coming on to be heard this day upon the plaintiff's amended bill, the answers of said defendants and the replications thereto, with the master's report herein made and the exceptions thereto filed by the defendant Bass, and the court, being fully advised in the premises, pronounces the following opinion, which, by order of the court, is filed and made part of the record, in these words:

I do not agree with the master that under the Indiana decisions the levy of the Stearns execution upon the property in question was void (though it was irregular) because of the previous levy
523 upon other real estate. It is quite clear that the property first levied upon, containing the encumbrances upon it and the wife's contingent interest, was not sufficient to satisfy more than a small part of the sum due upon the writ, and, this being so, the decision in Lindley *vs.* Kelly, 42 Ind., 294, is direct authority that the second levy and the sale under it is not to be held void merely because of the first levy, which had been abandoned by the owner of the execution. It was doubtless an irregularity to take out a new execution, as was done in this case, and such an irregularity as may justify an interference of the court in order to do equity between the parties, if it is apparent that substantial rights have been violated by the sale. But the property first levied upon having been insufficient in value, that levy did not, in my judgment, operate,
524 under the Indiana decisions, to satisfy the judgment lien in the full sense; and if, on account of the irregular issue of the second execution, the sale made under it should be set aside, it would result that the judgment must be considered as having been in force all the time, and, by virtue of it, Bass, being subrogated to the rights of Stearns and Co., who were not made parties to the complainant's foreclosure suit, would be entitled to redeem from the sale made to the complainant upon his decree.

Upon the second point it is quite clear that the complainant might have compelled the sale of the other property of Bowser to satisfy the Stearns execution before resort to the property covered by this mortgage; but not having gone to the courts for this relief the execution plaintiff was not bound to inquire into the
525 equities in this respect and to direct the order of sale accordingly; and it follows that the sale is not void nor to be annulled on this account at the instance of complainant. Sausberry *vs.* Lord, 82 Ind., 521; Wiggin *vs.* Suffolk Ins. Co., 18 Pick., 145, S. C. 29, Am. Dec., 576; James *vs.* Hubbard, 1 Paige; Clowes *vs.* Dickerson, 5 John. Ch., 235, S. C. (on appeal), 9 Cowen, 403; Wise *vs.* Shepherd, 13 Ill., 41.

Nevertheless the complainant, as some of the cases just cited show, is not without remedy; but from the defendant, who obtained an inequitable advantage by means of the sale as made, is entitled to compensation to the extent of that advantage—that is to say, to the extent of the value of the property so sold, not exceeding the amount due complainant upon his mortgage debt.

The rights of the parties are not affected, in my opinion,
526 by the extension of time granted upon payment of interest in advance upon the Stearns judgment. The extension was granted upon the supposed consent of Bowser and Co., and if Bowser's partners were not bound by that consent the agreement to extend was never binding, and execution might have issued at any time, the interest paid in advance being returned or treated as payment upon the judgment. Albright *vs.* Griffin, 78 Ind., 182.

The sale was not invalid, because the proper credits for payments

were not noted on the execution, Bass, the purchaser, having no knowledge of the facts. The purchaser at an execution sale is not bound to have examined the dockets to see if the clerk has done his duty in this repect. The presumption is that the officer has done his duty in such particulars. Fowler *vs.* Griffin, 83 Ind., 297.

The report of the master is perhaps not explicit on this point;
527 but, as I understand, it is not questioned that the property of Bowser, which was purchased by Bass, and which ought to have been sold on the Stearns execution before resort to the lands mortgaged to the complainant, was worth, over and above all encumbrances created before the execution of complainant's mortgage, more than the amount due upon that mortgage, treated as a subsisting security, and, this being so, the decree here ought to be that the defendant pay to the plaintiff, within a time stated, the amount due upon his mortgage, with stipulated interest to date of judgment, and that in default of this the sale to the defendant be annulled and the title of the complainant under his purchase be confirmed.

528 In so far as the master's report is inconsistent with the foregoing, the exceptions thereto are sustained, and in other respects overruled.

And thereupon the court doth say and find that the exceptions of said John H. Bass to the report of said master be sustained wherein the conclusions therein differ from the decree hereinafter set out; to which ruling of the court the plaintiff objects and excepts, and that the same is overruled to such portions as concur with the following decree; to which ruling of the court the defendant Bass objects and excepts; and the court does now find for said plaintiff that said report be approved wherein the same is not set aside; to which ruling the defendant objects and excepts, and that he do have and is entitled to the following decree and judgment of this court—that is:

It is hereby ordered, adjudged, and decreed by this court
529 that the sale made to the defendant, John H. Bass, of the south half of the southwest quarter of section eight, township thirty north, range thirteen east, except ten acres in the northeast corner thereof, and also the right of way granted to the Ohio and Indiana Railroad Company, and also that part of the west half of the northwest quarter of section seventeen, in said township and range, which lies north of the grounds of the Ohio and Indiana Railroad Company, containing twenty-three acres, all being in Allen county, State of Indiana, on the 3rd day of August, 1878, upon an execution issued on the 5th day of July, 1878, upon a judgment recovered in the Allen circuit court, Allen county, Indiana, on the 12th day of May, 1873, by Harmon E. Stearns, Charles F. Stearns, and Moses Oppenheimer against Reuben Gardner, Andrew
530 C. Gardner, and Henry Blish, as principals, and Jacob C. Bowser, Joseph R. Prentis, and Daniel M. Falls, as surities, for $2,212.85 and costs, is inequitable and void as against the plaintiff, and that the deed executed to said Bass by the sheriff of said Allen county on account of said sale be set aside and held for naught as against this plaintiff, unless said Bass do and perform the acts

and pay the sum of money hereinafter ordered and decreed that he do and pay to and for the use and benefit of the plaintiff; to which order and decree the defendant Bass excepts.

It is further ordered, adjudged, and decreed by the court that the amount of the plaintiff's claim, with the interest thereon, now is $10,878.00, and that he is entitled to an order and decree of this court quieting and setting at rest his title to said real estate
531 as against all of said defendants, unless said John H. Bass shall, on or before the 15th day of January, A. D. 1887, pay into the clerk's office of this court, at Fort Wayne, Indiana, for the use and benefit of the plaintiff herein said sum of $10,878.00; to which the defendant Bass also objects and excepts. It is therefore ordered that, upon the failure of said John H. Bass to pay said sum of money into said clerk's office on or before said day for said plaintiff's use and benefit, the plaintiff's title in and to said real estate hereinbefore set out be forever quieted and set at rest as against the defendants and all others claiming by, through, or under them, and that the plaintiff do have and recover of and from said defendants the possession of said real estate, and that the plaintiff do further recover of and from the defendants his costs and charges
532 herein laid out and expended, taxed at — dollars; to which order the said Bass also objects and excepts.

It is further ordered that if said John H. Bass pay said sum of money into said clerk's office that he is hereby declared to own and hold said real estate free and unencumbered from any claim by said Milmine or any one claiming title thereto on account of the execution of the mortgage by Jacob C. Bowser and his wife to David Smith on the first day of June, 1875, and foreclosed by the plaintiff herein in the superior court of Allen county, Indiana, on the 24th day of January, 1879, and that he be subrogated to all rights acquired thereto by said plaintiff.

It is further ordered that should said Bass pay said money
533 to said clerk that said clerk pay the same to the solicitors of the plaintiff on demand.

And to all the foregoing finding and decree the defendant Bass objects and excepts generally, both as to its form and effect.

And thereupon the defendant, John H. Bass, prays an appeal to the Supreme Court of the United States, which is granted by the court upon the filing of bond by said Bass in the sum of five thousand dollars, with John M. Coombs as surity; and thereupon said bond is now filed in these words:

Know all men by these presents that we, John H. Bass and John M. Coombs, are held and bound unto George Milmine in the sum of five thousand dollars; for the payment of which we bind ourselves, heirs, executors, administrators, and assigns, jointly
534 and severally, firmly by these presents.

Sealed and dated this 15th day of December, 1886.

The consideration of the above bond is such that whereas, in a suit pending in the circuit court of the United States for the district of Indiana, in which George Milmine is plaintiff and said John H.

Bass and others — defendants, said court has this day rendered judgment in favor of said Milmine against said Bass, from which judgment said —— —— appealed to the Supreme Court of the United States:

Now, therefore, if the said John H. Bass shall prosecute his said appeal without delay and pay all damages and costs which shall be adjudged or affirmed against him in such appeal, then this bond shall be void; otherwise in force.

J. H. BASS.
JOHN M. COOMBS.

And the same is approved by the court.

535 UNITED STATES OF AMERICA, *District of Indiana,* } *ss:*

I, Noble C. Butler, clerk of the circuit court of the United States within and for said district, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record in the case of George Milmine against John H. Bass and others as fully as the same remains upon the records now in my office.

Seal of the United States Circuit Court, Dist. of Ind.

Witness my hand and the seal of said court, at Fort Wayne, in said district, this 12th day of January, A. D. 1887.

NOBLE C. BUTLER, *Clerk,*
JOHN MORRIS, JR.,
Resident Deputy Clerk.

Endorsed on cover: Indiana C. C. U. S. No. 285. John H. Bass, appellant, *vs.* George Milmine. Filed January 20, 1887.

SUPREME COURT

OF THE

UNITED STATES.

JOHN H. BASS

v.

GEORGE MILMINE.

Brief for the Appellant.

BELL & MORRIS,
R. S. TAYLOR.

SUPREME COURT

OF THE

UNITED STATES.

JOHN H. BASS

v.

GEORGE MILMINE.

Brief for the Appellant.

STATEMENT OF THE CASE.

This is an appeal from a decree of the Circuit Court for the District of Indiana setting aside a sheriff's sale of land in Allen county, in that state, upon a bill filed for that purpose by the appellee, George Milmine. The land in dispute comprises 123 acres situated near Fort Wayne. It was the property of Jacob C. Bowser, and both parties claim through him. It was sold to the appellant, John H. Bass, August 3, 1878, by the sheriff of Allen County for $2,000, upon a judgment rendered May 12, 1873, in favor of H. E. & C. F. Stearns & Co. against Gardner, Blish & Co., as principals, and Jacob C. Bowser, Daniel M. Falls and Joseph R. Prentiss, who were partners under the firm name of J. C. Bowser & Co., in the sum of $2,212.35. The same land was mortgaged to David Smith, assignor to the appellee Milmine, June 1, 1875, for $4,885.19. The mortgage was foreclosed January 24, 1879, by a decree for $6,830, under which the land was sold to Milmine March 1, 1879, for $7,048.70.

Milmine's title rests upon the Smith mortgage, dated June 1, 1875; Bass's title upon the Stearn's judgment,

dated May 12, 1873. If the sale to Bass was valid he has the better title; if not, not. The validity of that sale is the question in the case.

The bill is voluminous and makes many sweeping charges of fraud, conspiracy and illegality. It is pretty difficult to extract from it any brief and clear statement of its material averments. As nearly as I can make it out, the grounds of objection to the sale stated in the bill may be summarized as follows:

1. That Bass was bound and foreclosed by Milmine's decree foreclosing his mortgage.

2. That there was a fraudulent conspiracy between Bass and the plaintiffs in the Stearn's judgment, their attorneys, and the sherriff.

3. That there was a fraudulent conspiracy between Bass and Bowser, by which Bass was to bid the property in for the benefit of Bowser.

4. That Bowser had other property out of which the Stearn's judgment could have been made without resort to that covered by the Milmine mortgage.

5. That Bowser & Co., who were sureties on the debt to Stearns & Co., had been discharged by agreement of Stearns & Co., with the principal debtors to delay collection.

6. That the Stearns execution had been satisfied by a prior levy on other property which had been abandoned without sale.

7. That some payments had been made on the Stearns judgment which were not credited in the execution, so that the sale was upon an execution calling for more than was due.

8. That the price paid by Bass was inadequate.

The case was referred to a Master "to take the evidence and report the same with his findings thereon," without specifying further whether he was to find the facts alone, or his conclusions of law also. He construed his functions to embrace both, and included in

his report the evidence at large, an abstract of the pleadings and proofs, and an inconclusive discussion of some of the questions of law. But he did not find explicitly that any fact in dispute was proved, or any express conlusion of law.

He stated that the questions presented to him by counsel for the complainant were confined to those numbered 6, 4, 5 and 7 in the foregoing synopsis of the bill. Upon the first of these he found as matter of law:

1. That the decisions of the Supreme Court of Indiana as to the effect of a levy on real estate as a satisfaction are binding upon the Federal Courts as a rule of property.

2. That the sale was not valid "if the value of the property levied upon under the execution issued upon the Stearns judgment was sufficient to satisfy or pay a substantial part of the judgment."

As to the value of the lots taken under the prior execution he found that in his opinion they were worth "at least $10,000 and probably $11,000," and that they were encumbered by prior specific liens amounting to $9,286.55. Whether they were "sufficient to satisfy or pay a substantial part of the judgment" or not he did not find.

As to the second question argued before him (No. 4 above, that the sale was void because there were other lands of Bowser's that could have been sold,) he reported no finding of fact or law.

As to the third question argued before him, (No. 5 above) he stated (what was not in dispute) that there was an extension of time to the principal debtors, but by consent of Bowser & Co. the sureties, given by J. C. Bowser himself. Upon the legal effect of such extension he expressed no opinion.

As to the fourth question argued betore him, (No. 7 above) he stated the undisputed fact that the execution was for $2,212, which was $241.94 more than was due

on the judgment, but he expressed no opinion as to the legal effect of the error.

He stated further that he did not understand it to be seriously insisted that Bass was bound by Milmine's decree of foreclosure, and that he obviously was not.

There was also contained in his report some other matter which I can not classify or describe, or present otherwise than by quotation, as follows:

It further appears in the testimony of Robert L. Stratton, who was an attorney representing other judgments against Bowser and others, that Bass had promised to bid on lots 116 and 117 when they were offered for sale on the Stearns judgment. Bass admits that such had been his intention at one time, but, upon ascertaining that there were prior liens, he felt it unsafe to bid and declined to bid upon them. Mr Stratton further states that Bass told him that "he or we would endeavor to get the Stearns judgment out of the way first;" "that he would try and find some property that could be levied upon by the Stearns judgment to advantage, and that after that the execution or the *vendi* in the Stearns case was released or returned unsatisfied, upon Bass's recommendation, and a new levy was made on the Stearns judgment on the land in controversy." Mr. Stratton says he had one or more conversations with Mr. Bass in which he spoke of having got that execution levied upon the piece of land upon which there was a subsequent mortgage then being foreclosed by Mr. Withers as attorney, and that Bass said it was the Milmine mortgage, and that by that means he would get ahead of that mortgage, as the Stearns judgment was the prior lien; that in several conversations Bass said that he thought he had cut out the Milmine mortgage by the purchase of the real estate on the Stearns judgment. and that neither Milmine or his attorney had discovered its purchase until it was too late to help themselves.

Mr. Bass is explicit in his denial that he made any arrangement or contract or agreement with the execution plaintiff, or with any body representing them or either of them with reference to such release before the levy on the property which was finally sold. He admits that he had some conversation with Mr. Stratton on the subject of the sale of lots 116 and 117, but he does not think he made a statement to Mr. Stratton that he procured a levy to be made upon the lands finally sold. He says he may have suggested that or other pieces of property that were levied upon by judgments that were prior to his mortgage; that he would have to bid what he could safely bid upon them in order to get the judgments out of the way. He denies that he told Mr. Stratton that he would have that Stearns matter

got out of the way and then he would make some arrangement so his matter could be settled. He would endeavor to have the judgments prior to his mortgage got out of the way by the sales of the property.

To explain Mr. Bass's relation to this business it is proper to state that he, as endorser and surety for the firm of Bowser & Co., had become liable to pay and had paid a large amount of money, and to indemnify him against loss Bowser and Bowser & Co. had given him a blanket mortgage on all Bowser's property.

This mortgage was junior to the Milmine mortgage and the Stearns judgment, as well as many other judgments which were liens upon Bowser's property.

Mr. Bass had a perfect right to attend the sales and bid as he saw fit, with a view to protecting his own interests; but to allow him to succeed in his efforts to cut out the Milmine mortgage would be, in the Master's opinion, grossly inequitable. The Master is inclined to the opinion that the testimony of Mr. Stratton as to Mr. Bass's agency in procuring the release of the levy on lots 116 and 117 and the levy of the *alias* execution upon the land covered by the Milmine decree is substantially correct, and that, though Mr, Bass's conduct may have seemed perfectly fair to him as a business matter, it was not such as should meet the approval of a court of equity. (Rec. p. 166-7.)

Bass filed exceptions to the report, assigning twenty-one specific grounds of exception, as follows:

1. For that said Master has found that the decisions of the Supreme Court of the State of Indiana to the effect that the levy of an execution upon real estate of sufficient value to pay the same is *prima facia* a satisfaction of such execution are binding upon Federal Courts in Indiana, and should be followed by this court in disregard of the contrary rule laid down by the Supreme Court of the United States.

2. For that said Master has found as matter of law that the sale made to the defendant Bass was not valid if the value of the property first levied upon under the execution issued upon the Stearns judgment was sufficient to satisfy or pay a substantial part of the judgment.

3. For that said Master has found that lots 116 and 117 in the original plat of Fort Wayne were worth when levied upon under the Stearns execution at least $10,000 and probably $11,000.

4. For that said Master has found that the levy on lots 116 and 117 had not been disposed of in any legal manner when the levy was made upon the real estate covered by the Milmine decree.

5. For that said Master found that Bass knew of the levy

on lots 116 and 117, and that it had been abandoned without having been legally disposed of, and that he made his purchase of the land in controversy with the full knowledge of all the facts pertaining to the manner of issuance and disposal of the writs issued upon the Stearns judgment.

6. For that said Master found that to allow him (Bass) "to succeed in his effort to cut out the Milmine mortgage would be grossly inequitable."

7. For that said Master found that "The Master is inclined to the opinion that the testimony of Mr. Stratton as to Mr. Bass's agency in procuring the release of the levy on lots 116 and 117 and the levy of the *alias* execution upon the lands covered by the Milmine decree is substantially correct, and that, though Mr. Bass's conduct may have seemed perfectly fair to him as a business matter, it was not such as should meet the approval of a court of equity."

8. For that said Master found that the sum of $2,212, with interest from January 1, 1877, for which execution was issued on the Stearns judgment July 6, 1878, was $241.94 in excess of the amount then due on said judgment.

Whereas said Master should have decided and reported:

1. That as a matter of law the rule laid down by the Supreme Court of the United States with respect to the effect of a levy of an execution as satisfaction thereof is the rule to be followed by this Court in preference to a contrary rule laid down by the Supreme Court of Indiana.

2. That as a matter of law a levy on real estate is not, *per se*, any satisfaction of the execution or judgment.

3. That as a matter of fact said lots 116 and 117 on the original plat of Fort Wayne were worth, clear of all encumbrances, less than $10,000 from the time they were levied on under the Stearns execution until the levy was abandoned.

4. That as a matter of fact said lots 116 and 117; subject to the then existing prior specific liens upon them and subject to the contingent interest of Delilah Bowser, the wife of Jacob C. Bowser, were not worth enough to satisfy the Stearns execution.

5. That as matter of fact said lots 116 and 117, subject to prior specific liens and the contingent interest of Mrs. Bowser, and the then existing prior general liens on the property of Jacob C. Bowser, were not worth enough to satisfy the Stearns execution.

6. That the repeated efforts made by the sheriff to sell said lots 116 and 117 exhausted the remedy of Stearns & Co. against them and would have entitled said Stearns & Co. to an order of court on application setting aside the levy on said lots.

7. That the abandonment of said levy on lots 116 and 117 without any order of court was, at most, but an irregularity of proceeding not sufficient to invalidate a subsequent sale on *alias* execution.

8. That the sale made by the sheriff of Allen County to John H. Bass on the 3d day of August, 1878, of the land in dispute under the *alias* execution issued on the Stearns judgment, was not, by reason of the former and abandoned levy on said lots 116 and 117, void.

9. That the act of said Bass in buying the land in dispute at sheriff's sale, as he did, was not unjust or inequitable toward the plaintiff.

10. That the defendant Bass made no effort and did no act "to cut out the Milmine mortgage."

11. That in respect to the alleged agency of the defendant Bass in procuring the release of the levy on lots 116 and 117 and the levy of the *alias* execution upon the land covered by the Milmine decree, the allegations of the answer are supported by the evidence.

12. That there was due on the Stearns judgment at the time of the sale to Bass of the land in dispute the sum of $

13. That the averments of the bill are unsupported by the evidence.

14. That the facts, the law and the equity are with the defendants. (Rec. p. 168.)

Without sustaining or overruling any of the exceptions specifically the Court pronounced the following opinion:

I do not agree with the Master that under the Indiana decisions the levy of the Stearns execution upon the property in question was void (though it was irregular) because of the previous levy upon other real estate. It is quite clear that the property first levied upon, considering the encumbrances upon it and the wife's contingent interest, was not sufficient to satisfy more than a small part of the sum due upon the writ, and, this being so, the decision in *Lindley* vs. *Kelly*, 42 Ind., 294, is direct authority that the second levy and the sale under it is not to be held void merely because of the first levy, which had been abandoned by the owner of the execution. It was doubtless an irregularity to take out a new execution, as was done in this case, and such an irregularity as may justify an interference of the Court in order to do equity between the parties, if it is apparent that substantial rights have been violated by the sale. But the property first levied upon having been insufficient in value, that levy did not, in my judgment, operate, under the Indiana decisions, to satisfy the judgment lien in the full sense; and if, on account of the irregular issue of the second execution, the sale made under it should be set aside, it would result that the judgment must be considered as having been in force all the time, and, by virtue of it, Bass, being subrogated to the rights of Stearns & Co., who were not made parties to the complain-

ant's foreclosure suit, would be entitled to redeem from the sale made to the complainant upon his decree.

Upon the second point it is quite clear that the complainant might have compelled the sale of the other property of Bowser to satisfy the Stearns execution before resort to the property covered by his mortgage; but not having gone to the courts for this relief the execution plaintiff was not bound to inquire into the equities in this respect and to direct the order of sale accordingly; and it follows that the sale is not void nor to be annulled on this account at the instance of complainant. Sansberry vs. Lord, 82 Ind., 521; Wiggins vs. Suffolk Ins. Co., 18 Pick., 145, S. C. 29 Am. Dec., 576; James vs. Hubbard, 1 Paige; Clowes vs. Dickerson, 5 John. Ch., 235, S. C. (on appeal) 9 Cowen, 403; Wise vs. Shephard, 13 Ill., 41.

Nevertheless the complainant, as some of the cases just cited show, is not without remedy; but from the defendant who obtained an inequitable advantage by means of the sale as made, is entitled to compensation to the extent of that advantage—that is to say, to the extent of the value of the property so sold, not exceeding the amount due complainant upon his mortgage debt.

The rights of the parties are not affected, in my opinion, by the extension of time granted upon payment of interest in advance upon the Stearns judgment. The extension was granted upon the supposed consent of Bowser & Co., and if Bowser's partners were not bound by that consent the agreement to extend was never binding, and execution might have issued at any time, the interest paid in advance being returned or treated as payment upon the judgment. Albright vs. Griffin, 78 Ind., 182.

The sale was not invalid, because the proper credits for payments were not noted on the execution, Bass, the purchaser, having no knowledge of the facts. The purchaser at an execution sale is not bound to have examined the dockets to see if the clerk has done his duty in this respect. The presumption is that the officer has done his duty in such particulars. Fowler vs. Griffin, 83 Ind., 297.

The report of the master is perhaps not explicit on this point; but, as I understand, it is not questioned that the property of Bowser, which was purchased by Bass, and which ought to have been sold on the Stearns execution before resort to the lands mortgaged to the complainant, was worth, over and above all encumbrances created before the execution of complainant's mortgage, more than the amount due upon that mortgage, treated as a subsisting security, and this being so, the decree here ought to be that the defendant pay to the plaintiff, within a time stated, the amount due upon his mortgage, with stipulated interest to date of judgment, and that in default of this the sale to defendant be annulled and the title of the complainant under his purchase be confirmed.

In so far as the master's report is inconsistent with the foregoing, the exceptions thereto are sustained, and in other respects overruled. (Rec. p. 171-2.)

Comparing the opinion with the report of the Master it will be seen—

1. That the Court overruled the Master on the first point presented in the report,—that relating to the effect of the first levy as a satisfaction of the judgment.

2. The Court found distinctly that upon the second point argued before the Master, (but on which he made no finding) the law was with Bass; that while Milmine might have procured a marshalling of the assets by a proceeding for that purpose, Stearns & Co. were not bound to do it for him, and that the sale could not be annulled on that ground.

3. The Court also found expressly that the third point argued before the Master (but upon which also he made no finding) was not well taken;—that the judgment was not discharged by extension of time to the principal debtors.

4. The Court also found expressly that the fourth point argued before the Master (but upon which also he made no finding) was not well taken; that the sale was not invalid because the proper credits for payments were not entered on the execution.

It appears, therefore, that upon every point which was argued before the Master the Court found the law to be with the defendant Bass. Nevertheless the decree was against him.

Both the Master and the Court express some unfavorable opinion of Mr. Bass, but not on the same ground. The Master "seems inclined to the opinion" (those are his words) that Mr. Bass had something to do with the abandonment of the unsatisfied execution on the Stearns judgment and the subsequent levy of the *alias* on the land sold. The Court takes no notice of that point, but alludes to some "inequitable advan-

tage" obtained by Bass in the sale, without stating what it was.

I wish I could make a shorter, clearer statement of the case. But it is not my fault that I do not, and can not. The failure of the Master to find anything explicitly, and the refusal of the Court to either sustain or overrule the exceptions make it impossible to extract from the record any clearly defined statement of the question presented for argument and decision here.

ASSIGNMENT OF ERROR.

I submit that the Circuit Court erred

1. In refusing to either sustain or overrule explicitly the exceptions taken by Bass to the report of the Master.

2. In rendering judgment and decree against the appellant without any finding of facts by either the Master or the Court to sustain it.

3. In holding that the taking out of the new execution was such an irregularity as may justify an interference of the Court.

4. In holding that the appellant Bass obtained an inequitable advantage by the sale as made.

5. In holding that other lands of Bowser ought to have been sold on the Stearns execution before resort to the lands covered by the Milmine mortgage.

6. In holding that the sale to Bass of the lands described in the bill was inequitable and void, and ordering and decreeing that the same should be set aside.

7. In requiring Bass to pay in redemption of the Milmine mortgage $10.878, being the principal of the indebtedness secured by said mortgage with interest at ten per cent per annum.

BREIF.

In respect to the first and second assignments of error I have to say only that I believe the appellant has just ground for complaint against the Master and the Court for the reasons stated. Next to sentence of death or deprivation of liberty the divesting of a man's title to land is the most serious exercise of the power of the Court over the rights of the citizen. It is not possible that a just occasion can arise for the exercise of that power without some reason which can be plainly expressed in words. It ought to be possible to make upon the record in a chancery cause as clear a statement of the issue tried and the ground of judgment as in a law case. To secure that result it is necessary only that the Master shall state his findings distinctly, that the exceptions shall be clear and explicit, and that they shall be specifically sustained or overruled by the Court.

Such clearness and precision of procedure is not only the right of the suitor as matter of form, and to give effect to his right of appeal, but it is indispensable to the certain administration of justice. I think that the Master and the Court were both in error in this case, and that they fell into that error because neither of them took the pains to ascertain exactly either the facts or the law on which he based his conclusions There is no finding in the record that the facts stated in the bill are true, or that any particular allegation in it supporting the decree is true. Without such a finding somewhere the decree seems to me like a judgment at law without a verdict.

This brings me to the fundamental questions in the case,—the grounds stated in the opinion of the Court, (if it can be said that any are stated) for setting aside the sale to Bass. And of these I shall consider first

that referred to in the third assignment of error, which relates to the effect of the prior levy under the Stearns judgment. The facts which affect this question are as follows:

May 12, 1873; Stearns judgment rendered, $2,212.85.
June 12, 1877; execution issued to sheriff of Allen County.
June 26, 1877; levied on lots 116 and 117, Fort Wayne.
July 21, 1877; offered for sale; no bidders.
Sept. 21, 1877; offered second time; no bidders.
Nov. 26, 1877; returned unsatisfied.
October 9, 1877; execution to sheriff of Miami County, (the residence of Gardner Blish & Company, the principal debtors.) Ret nulla bona Oct 25.
Nov 26
~~October 25, 1877~~; second execution to Sheriff of Allen Co.—a *vendi*, reciting the former levy, and directing sale of lots 116 and 117.
December 22, 1877; third offer of sale; no bidders.
April 3, 1878; returned unsatisfied.
July 5, 1878; third execution (second *vendi*) to sheriff of Allen county.
July 6, 1878, returned endorsed "This execution is returned unsatisfied: the within levy released. Clerk will please issue *alias* execution. C. A. Munson, sheriff."
July 6, 1878; alias execution to sheriff of Allen county.

Under this execution the lands in dispute were levied upon and sold to Bass, which is the sale here to be considered. These executions and returns are found in the printed record, on pages 76 to 86 inclusive.

Was the sale to Bass void by reason of the prior levy on lots 116 and 117?

It is the settled doctrine of this Court that a levy on real estate does not operate as a satisfaction of the execution as does a levy on personal property. In *United States* v. *Dashiel*, 3 Wall. 688, the reasons for the rule are stated as follows:

> Actual satisfaction beyond the amount specified in the return of the marshal cannot be pretended, but the theory is, that the levy of the execution in the manner stated affords conclusive evidence that the whole amount was paid; and it must be admitted that one or two of the decided cases referred to appear to give some countenance to that view of the law; that is, they assert the general doctrine, that the levy of an execution on per-

sonal property sufficient to satisfy the execution operates *per se* as an extinguishment of the judgment. None of those cases, however, afford any support to the theory that any such effect will flow from the issuing of an execution, and the levying of the same upon land. On the contrary, the rule is well settled, that in the latter case no such presumption arises, because the judgment debtor sustains no loss by the mere levy of the execution, and the creditor gains nothing beyond what he already had by the lien of his judgment. Reason given for the distinction is that the land in the case supposed remains in the possession of the defendant, and he continues to receive and enjoy the rents and profits. Many qualifications also exist to the general rule as applied to the levy of an execution upon the goods of the judgment debtor, as might be illustrated and enforced by decided cases. Where the goods seized are taken out of the possession of the debtor, and they are sufficient to satisfy the execution, it is doubtless true, that if the marshal or sheriff wastes the goods, or they are lost or destroyed by the negligence or fault of the officer, or if he misapplies the proceeds of the sale, or retains the goods and does not return the execution, the debtor is discharged; but if the levy is overreached by a prior lien, or is abandoned at the request of the debtor, or for his benefit, or is defeated by his misconduct, the levy is not a satisfaction of the judgment. Rightly understood, the presumption is only a *prima facie* one in any case, and the whole extent of the rule is that the judgment is satisfied when the execution has been so used as to change the title of the goods, or in some way to deprive the debtor of his property.

The same distinction is maintained in the State courts, other than those of Indiana, without an exception that I have noticed.

Arkansas,—*Trapnall* v. *Richardson*, 13 Ark. 543.

Georgia,—*Wyley* v. *Stanford*, 22 Geo. 385; *Hammond* v. *Myrick*, 14 id. 77; *Rawson* v. *Davis*, 36 id. 511.

Illinois,—*Gregory* v. *Stark*, 4 Ill. 611; *Gold* v. *Johnson*, 59 id. 62; *Robinson* v. *Brown*, 82 id. 297.

Michigan,—*Spofford* v. *Beach*, 2 Dong. 150.

Minnesota,—*First Nat. Bank* v. *Rogers*, 13 Minn. 409.

Mississippi,—*Smith* v. *Walker*, 18 Miss. 584; *Peale* v. *Bolton*, 24 id. 630.

New York,—*People* v. *Hobson*, 1 Denio, 578; *Waddell* v. *Elmendorf*, 5 id. 448; *Green* v. *Burk*, 23 Wend. 490.

Oregon,—*Wright* v. *Young*, 6 Oregon 87.

Pennsylvania,—*Gro* v. *Huntingdon Bank*, 1 Pa. 425.

Tennessee,—*Hogshead vs. Carruth*, 5 Yerg. 227; *Carroll* v. *Fields*, 6 id. 305.

Texaa,— *White* v. *Graves*, 15 Tex. 183.

In Indiana, by as curious an illustration as can be found in the law of the way in which the doctrine of *stare decisis* sometimes builds legal rules on nothing, a different doctrine is established. In two cases in the first volume of our reports,—*Laselle* v. *Moore*, 1 Blackf. 226, and *McIntosh* v. *Chew*, id. 289, it was held, upon objection being made before sale to a second levy while a former levy remained undisposed of, that the former levy operated as a satisfaction of the execution. No distinction was alluded to between levies on land and levies on goods, and the point was apparently not made by counsel or thought of by the Court. There is not the slightest reason for supposing that if the distinction had been stated as it was by this Court in *U. S.* v. *Dashiel*, it would not have been recognized and acted upon, as it has been in other States. But other decisions followed these one after another in similar form until the doctrine was so firmly established that when at last some one called attention to the point the Court held that it was too late.

And now the question is whether the rule established by these decisions is binding on the Federal Courts in Indiana to the exclusion of the doctrine established by this Court. This question the Master answered in the affirmative; the Court expressed no opinion upon it. As will appear later, the point is not controlling, and will not justify the consumption of much time or space. So I shall content myself with a very brief discussion of it. It is provided by the Federal statute that:

> The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply. R. S. § 721.

But the doctrine here in question is not *law* in the

sense of this statute. The Supreme Court of Indiana has no power to make law. Its deliverances on this subject are but expositions of the common law. Unless they have a just foundation in the common law, they have none at all, and are mere usurpation. The case is one, therefore, which falls within the rule laid down in *Chicago* v. *Robbins*, 2 Black, 418, that "When private "rights are to be determined by the application of com- "mon law rules alone, this Court, although entertain- "ing for State tribunals the highest respect, does not "feel bound by their decisions."

Moreover, this is not an action at law, but a suit in equity, to which it is held expressly that a different rule applies. The courts of the United States, sitting in chancery, administer but one system of jurisprudence. In *Neves* v. *Scott*, 13 How. 268, this Court say:

> Wherever a case in equity may arise and be determined, under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the Courts of the United States, and for this Court in the last resort, to decide what those principles are, and to apply such of them to each particular case, as they may find justly applicable thereto. These principles may make part of the law of a State, or they may have been modified by its legislation, or usages, or they may never have existed in its jurisprudence. Instances of each kind may now be found in the several States. But in all the States, the equity law, recognized by the constitution and by acts of congress, and modified by the latter, is administered by the Courts of the United States, and upon appeal by this Court.

The plaintiff has appealed to the chancery jurisdiction of the Federal Court, and must show himself entitled to relief, upon principles of equity recognized and administered by that Court. Suppose he had no point to urge except the single one of a prior levy. What is the ultimate ground on which he must rest his claim? I have said that the doctrine of satisfaction by levy is part of the common law, which is true. But it is true further, that it is one of those common law principles which have their roots in equity. Why was it that a levy on personal property sufficient to pay the

debt was first held to operate as satisfaction? Not because it was actual satisfaction, or because any statute made it constructive satisfaction, but because it was inequitable to allow a plaintiff who had taken into possession the goods of the defendant, sufficient in value to pay the debt, to ignore his own act and pursue the defendant in other ways. And the question here is: Do the same equitable considerations apply to a levy on land? This Court have said they do not. The whole scope of the reasoning in *United States* vs. *Dashiel* is to the effect that the equitable considerations upon which a levy on goods operates as satisfaction, do not apply to a levy on land.

It seems to me further, that the finding of the Master that the doctrine held by the Supreme Court of Indiana has become a rule of property is not quite accurate. Undoubtedly a litigation affecting the title to property may turn on the decision of this question. But the same is true of every principle of law, whether it pertain to evidence, contracts, estoppel, or what not. I take it that the phrase "a rule of property," though often loosely used, means a rule of law affecting directly, and in its primary operation, the title to property—as a rule of descent, or a rule affecting the making or construction of wills, deeds, or the like. It becomes a question instantly, whenever a levy is made on land, whether or not the judgment has been thereby satisfied. But the decision of that question then and there, whether it be one way or the other, affects no one's title to property. Whether it shall have that effect at any time thereafter, depends on the subsequent course of events. It may, or it may not. So that the rule is one which affects the title to property only secondarily and contingently. But in that sense every rule of law is a rule of property. Such a theory would allow the Federal Courts in Indiana less independence than is enjoyed by the Justices of the Peace.

But the more important proposition is, that a levy on either land or goods, in order to operate as a satisfaction, must be on property *sufficient in value to satisfy the judgment*. In this particular the Indiana decisions are in entire harmony with the general rule. In *Lindley* v. *Kelley*, 42 Ind. 294, the Court, commenting on the broad language of *McIntosh* v. *Chew*, say:

> It is very manifest to us that the learned judge who delivered the opinion of the Court in that case, did not intend to hold that a mere levy, without reference to the value of the property levied on, raised a presumption of satisfaction. The cases referred to lay down the proposition that a levy upon property *sufficient to pay the debt* raises the presumption of satisfaction. Such is the rule as laid down in all the other decisions of this Court, and by the text writers and adjudged cases in this country and in England. We have found no other authority which holds that a mere levy, without reference to the sufficiency of the property to pay the debt, raises a presumption of satisfaction. None of the decisions assumes that a levy produces any absolute satisfaction. It is a satisfaction *sub modo*. So long as the property remains in legal custody, the other remedies of the creditor will be suspended.

The same limitation is stated in *Frank* v. *Brasket*, 44 Ind. 92; *McCabe* v. *Goodwin*, 65 Ind. 288; and many other cases.

Were lots 116 and 117 sufficient in value to satisfy the Stearns judgment?

It was stipulated that the specific liens on lots 116 and 117 amounted to $8,008.63. (Rec. page 138.) The Master found them to be $9,286.55. (Rec. page 166.) I suppose this was a clerical error; and take the true amount to be that fixed by the stipulation. The lots were also subject to the contingent interest of Mrs. Bowser, who was then living at the age of sixty-three, her husband's age being seventy. (Rec. page 141.) By the law of Indiana she would be entitled to from one-third to one-fifth of her husband's lands in fee if she survived him, depending on the total value of the estate. The Master placed the value of the lots at "at least $10,000 and probably $11,000." The plaintiff's witnesses varied in their estimates from

$7,200 to $12,000. An average of all of them is $10,550. The chances were several to one that Mrs. Bowser would outlive her husband. At all events her interest was an incumbrance upon the property which would impair its value at a judicial sale quite to the extent of its fraction of the whole. Taking her interest under the statute at one-fifth, it would amount, at a valuation of $10,550, to $2,110. Adding this to the specific liens of $8,008.63 we have $10,118.63, which from $10,550.00 would leave $431.47, or less than one-fourth of the amount due on the Stearns execution. It is obvious, therefore, that lots 116 and 117 were totally insufficient in value to satisfy the judgment. Hence the levy, under the most liberal application of the Indiana rule, was not a satisfaction of the execution.

To this point the views here presented are in harmony with the opinion of the Circuit Court, which was in terms that "the second levy and the sale under it are "not to be held void merely because of the first levy, "which had been abandoned by the owner of the exe- "cution."

But the learned Judge then goes on to say: "It was "doubtless an irregularity to take out a new execution, "as was done in this case, and such an irregularity as "may justify an interference of the court in order to do "equity between the parties if it is apparent that sub- "stantial rights have been violated by the sale."

This is one of the two sentences in the opinion that seem to stand as the sole foundation for the decree. To my mind its meaning is not entirely clear. I suppose the rule to be elementary that a judicial sale is never void for mere irregularity of procedure. In *Kerr* v. *South Park Commissioners*, 8 Biss, 276,—Justice HARLAN presiding, the case showed, first, a levy on real estate, advertisement, and failure to sell; second, an *alias* execution, a second levy on the same land, and a failure to sell for want of bidders; third, a *pluries* execution, a

third levy on the same land, and a sale on which the title in dispute rested. It was held that the sale was valid. The Court said:

Assuming that the levy made under the execution of December 14, 1859, was not waived by the order of plaintiff's attorney to return it without further proceedings, and conceding, as must be done, that the proper and regular mode to give effect to the levy under that execution, was to issue a *venditioni exponas*, and not a *pluries* execution, the Court is not prepared, in view of the authorities and what seems to be the settled practice in this state, to say that a subsequent levy and sale under the *pluries* execution issued upon the same judgment, and levied upon the same property, for the same debt, was void.

The issuing of the *pluries* execution should rather be considered as a waiver of any rights acquired by the levy under the former execution. It was, at most, a mere irregularity to issue the *pluries* execution rather than a *vend. ex.*, but advantage of that irregularity should have been taken (if it could have been taken at all) in apt time.

The settled practice of the State, to which the Court gave weight in this case, reaches in Indiana to the beginning of her jurisprudence. The doctrine that a mere irregularity of procedure does not invalidate a judicial sale has been applied by our Supreme Court in a great number and variety of instances. In the early case of *Doe* v. *Dutton*, 2 Ind., 309, a sale of lands was called in question upon the ground that a prior levy remained undisposed of. It was conceded, apparently, that the land first levied upon was not the property of the judgment debtor. But it was urged that it was erroneous to issue a second *fi. fa.* without disposing of the levy, and that as the attorney of the execution plaintiff was the purchaser he was chargeable with notice. But the Court said:

"It is well settled that such a levy upon property as does not amount to a satisfaction is no bar to further execution on the judgment. * * * The prior levy in this case, then, not being such as to be regarded a satisfaction of the judgment, the issue of the subsequent execution before a return to the former, or other proceedings to effect a vacation of the levy had been h l, was at most but an error which rendered the execution vo dable, but not void; and being such, the sale under it was not void; *for a sale under a voidable, but not void, execution is valid,*

even to a purchaser with notice of the fact, where there is no fraud.

The same rule runs through all our reports. *Soule* v. *Champion*, 16 Ind., 165; *Culbertson* v. *Milhollin*, 22 Ind., 362; *Marity* v. *Eastridge*, 67 Ind., 211; *Martin* v. *Prather*, 82 Ind., 535; *Martin* v. *Pifer*, 96 Ind., 245; *Rose* v. *Ingram*, 98 Ind., 276.

See also *Griffith* v. *Bogert*, 18 Howard, 158; *Durham* v. *Heaton*, 28 Ill., 264; S. C. 81 Am. Dec. 275; *Stein* v. *Chambless*, 18 Iowa, 474; S. C. 87 Am. Dec. 411; *Hunt* v. *Loucks*, 38 Cal., 372; S. C. 99 Am. Dec. 404.

But for the sake of the argument I will drop the distinction between void and voidable proceedings, and assume that a mere irregularity will justify an interference by the Court if it is apparent that substantial rights have been violated by the sale. Was the irregularity here shown one of that class?

It is clear that no actual injury was done to any one by the first levy or by its release. The possession of Bowser was not disturbed. Nothing was taken from him or his creditors. The same end could have been reached by other steps of unquestionable regularity. The execution was without appraisment. A bid of a dollar apiece for the lots by Stearns & Co., or Bass, or any one else, would have been sufficient, in view of the prior liens, to merge the levy in a legal sale, and the execution could then have been levied on any other property. Or, on finding lots 116 and 117 insufficient to satisfy the execution the sheriff could have taken as much more property as might be necessary without waiting to sell that levied on first. *Lindley* v. *Kelley*, 42 Ind., 294.

Or Stearns & Co. could have applied to the Court to set aside the levy, with absolute certainty that the motion would be granted. The failure of three efforts to sell, taken in connection with the amount of prior liens, would have furnished the highest possible proof

that nothing could be made by the levy. The question was one that concerned no one except Bowser and the execution plaintiffs. Milmine had no right to say anything about it. But Bowser made no objection. By releasing the levy Stearns & Co. accomplished with the acquiescence of the only other party interested, and without legal proceedings exactly what the Court would have been bound to order on motion. Surely this can not be called a substantial violation of any one's rights.

Moreover, the levy on lots 116 and 117 was itself irregular and voidable in quite as substantial sense as the issue of the *alias* execution. Bowser was a surety debtor. It was the duty of Stearns & Co. to exhaust the property of the principals, Gardner, Blish & Co., before taking that of Bowser. This had not been done at the time of the levy on lots 116 and 117. It was done afterward by execution issued October 9, 1877, and returned *nulla bona*. (Rec. page 79). But there was no renewal of the levy after that, and if it was illegal when made, it remained so.

Furthermore, lots 116 and 117 constituted the homestead of Bowser, and by the law of Indiana were not subject to sale until his other property was exhausted.

Taking all these facts together, it seems to me that it must be conceded that the release of the levy and the issuing of the *alias* execution was an irregularity absolutely harmless in law and fact to any one. Up to that point nothing occurred to which Milmine could or would have objected if his opinion had been asked at the time. If he has anything to complain of it begins with the levy of the execution on the land covered by his mortgage.

I assume that when the learned Judge of the Circuit Court speaks of "such an irregularity as may justify an "interference of the Court in order to do equity between "the parties if it is apparent that substantial rights have been violated by the sale," he is to be understood as referring to a case in which substantial rights have been

violated *by means of the irregularity*. He did not mean that a court of equity will resort to a harmless irregularity as a *pretext* for setting aside a sale, the real reason moving the Court being something else. I should feel myself guilty of contempt to suggest such a thought. The law has a remedy for every substantial violation of right without indulging in false pretenses of wrong as an excuse for its judgments.

We may, therefore, I think, put aside the levy on lots 116 and 117 and its release as having nothing to do with this controversy. So far as Milmine is concerned we may regard the *alias* execution as the first execution issued after the return of *nulla bona* as to Gardner Bliah & Co.

This brings us to the question of the right of Stearns & Co., to levy their execution on the land covered by Milmine mortgage.

Bowser had other lands subject to the lien of the Stearns judgment. They were encumbered by a mass of other liens. But for the present purpose it will simplify the discussion to disregard them, and treat the Milmine mortgage and the Stearns judgment as the only liens to be considered. That Milmine was entitled in such case to require Stearns & Co. to exhaust the other lands of Bowser before sale of the lands covered by his mortgage is admitted. But that Stearns & Co. were bound to anticipate his wishes and marshall the assets themselves is denied. On the contrary they were entitled to levy their execution on any land belonging to Bowser without regard to other liens.

On this point *Sansberry* vs. *Lord*, 82 Ind., 521, is an authority. In that case a judgment debtor who was the owner of several tracts of land subject to the lien of a judgment sold one of them. The judgment creditor, without exhausting the lands which remained in the hands of his debtor, levied upon and sold the parcel so conveyed. The object of the action was to set aside

that sale, and it was put on the very ground claimed here, that the sale of the parcel conveyed was unlawful until that which remained in the hands of the debtor had been exhausted. On this the Court say:

BEST, C.—It is not averred that James McGraw had any property, and, if he had none, the failure of the sheriff to make a demand upon him for property will not invalidate the sale. The appellees do not claim that it will, but insist that the failure to exhaust the residue of the property of William C. Flemming renders it invalid, and in support of this proposition cite *Day* v. *Patterson*, 18 Ind. 114, *Sidener* v. *White*, 46 Ind. 588, and *Houston* v. *Houston*, 67 Ind. 276. These cases do not decide the question here involved. They merely decide that where a judgment is a lien upon two or more parcels of real estate, and one of them is thereafter sold, the judgment creditor will be restrained from selling such parcel until the residue of the land is sold, but do not decide that if such parcel be sold the sale is invalid. It is presumed to be the duty of the judgment debtor, as between himself and his vendee, to pay the judgment, and if he retains any of the property encumbered by it, a court of equity will, without imparing the lien, require the judgment creditor to first exhaust the property held by the debtor so as to protect his vendee. This, however, will not be done unless it is desired, and if a vendee stands by and suffers his property to be sold without asking such relief, we know of no case that holds such sale invalid simply because he was entitled to such order. Such rule of law would require judgment creditors to adjust the equities of persons interested in the land encumbered by the judgment without any notice of their existence, and would defeat the title of a purchaser at sheriff's sale though he had no notice of an outstanding title or a secret equity. The judgment being a lien upon the entire land, the creditor was authorized to sell any portion of it, in the first instance, in the absence of an order directing it to be otherwise offered.

Upon the view taken by the Master, I might claim that this decision establishes a rule of property in Indiana, binding on this Court. But I do not put it on that ground. I cite it as an authority in point, of persuasive force because consistent with reason, and because also of the respect due to the Court that decided the cause and the judge who wrote the opinion.

In *Terry* v. *Woods*, 6 Sm. & M., 139; 45 Am Dec. 274, a bill to foreclose a mortgage was resisted by a junior creditor on the ground that the plaintiff had let go

another security out of which he might have made his debt. The Court say:

If a man have two separate securities for a debt, he may resort to either for payment; he may release one, without affecting his right to another. It is true, that if another person has a lien on one of the securities, he may file a bill to have them marshalled, and compel the creditor who has the two, to resort to the one on which there is no encumbrance, and exhaust that before he comes upon the one on which there is a joint claim. But if no such bill has been filed, nor any steps taken to compel the creditor having two securities to take such course, we are not aware of any principle which will deprive him of one, because he has not made the other available.

In *Wiggin* v. *Suffolk Ins. Co.*, 18 Pick. 145; 29 Am. Dec. 376, a question of similar nature was presented; and the following language used in the opinion of Chief Justice SHAW:

Where a creditor has a lien on two distinct funds he may resort to either, although other persons may have subsequent claims, so that his election may benefit one in preference to another. A court of law will not oblige a creditor so to marshall his claim as to charge one fund and release another, where both are liable

In *James* v. *Hubbard*, 1 Paige, 228, a case cited by the plaintiff below, Chancellor WALWORTH says:

In several cases the principle has been recognized that where a creditor has a right to resort to two funds for the satisfaction of his debt, the party who has a subsequent claim upon one fund only, may compel him to exhaust the other fund before he resorts to that in relation to which such subsequent claim exists. It is insisted by the defendant's counsel that this can only be done by a resort to the equitable power of this court in the first instance; and I *am not aware of any case where it has been held that the creditor must, at his peril, decide upon the equitable rights existing among the holders of different portions of the property on which he has a general lien* for the satisfaction of his debt.

But the case most completely covering the points so far discussed is *Richey* v. *Merritt*, 108 Ind., 347. In that case the facts were substantially as follows: On May 31, 1877, judgment was rendered against Marcellus Bristow. He was then the owner of a number of parcels of land which became subject to the lien of the judgment, and which he afterward sold to various purchasers at different times. The first of these sales was to

John Merritt, April 3, 1879. Two others were made September 23, 1879, a fourth to James Richey, February 16, 1880, and others afterward. On April 13, 1880, execution was issued and levied on the land sold to Richey. On the day advertised for sale Richey paid the amount of the judgment to the execution plaintiff and took an assignment of the judgment to himself. The execution was returned without sale. Without any disposition having been made of the levy an *alias* execution was issued for the use of Richey, and levied on a number of parcels of land, without any reference to the order of their conveyance by Bristow. Under this execution the land conveyed to Merritt was sold. The suit was to set aside that sale.

It will be observed that we have here all the substantial elements of the case at bar. There was a levy on land, as in this case; a return of the execution without sale, as in this case; the issue of an *alias*, as in this case; and a sale under the *alias* of the land first conveyed by the judgment debtor in disregard of the equity which the plaintiff could have asserted by timely proceedings to have the lands last conveyed sold first. I quote the following from the decision of the Court:

> It is quite evident from the facts found by the Circuit Court that Merritt, the plaintiff, might, at the proper time, have caused Richey to be enjoined from selling the particular lots in controversy in this case until the latter had first exhausted the lands more recently conveyed to others by Marcellus Bristow, or that he might, by other proceedings, have obtained an order in advance requiring Richey to make sale of the lands conveyed away by Bristow in the inverse order of their alienation. *Sansberry* v. *Lord*, 82 Ind. 521. But, as must have been observed, the special finding of facts contains nothing showing any excuse for the failure of the plaintiff to take measures for his protection either in the one or the other methods indicated. Upon the facts found, the reasonable inference is that the plaintiff had notice in due time, of both the levy upon and sale of his property, and that he made no objection to either until after the sale was consummated. It was then too late to object that the proper order of priority was not observed in making the levy as well as the sale. *Sansberry* v. *Lord*, *supra*.
>
> It is also true, that the levy of an execution upon property,

whether real or personal, of sufficient value to pay the judgment upon which it is issued creates a presumption of the satisfaction of such judgment, and operates as such until the levy is legally disposed of, either by the sale of the property or in some other lawful manner, and that an *alias* execution issued upon such judgment before such levy is legally disposed of, is both irregular and voidable, and may be set aside on motion if made before the property is sold upon it.

But where the execution defendant waives his right to have an *alias* execution so issued set aside, and permits his property to be levied upon and sold under it he can not afterwards question the validity of the sale on account of the irregular and voidable character of the execution.

The objection, therefore, that the execution in question in this case was improvidently issued and in consequence voidable, can not now be made available as a cause for setting aside the sale made upon it."

It may be said that this case is to be distinguished from the one at bar by the circumstance that Merritt, the owner of the land, knew of the levy and sale at the time, while Milmine did not. But if Milmine had all the notice which the law requires, and if there was no duty resting upon any one to give him more, and if no one did any act to keep any knowledge from him, how can the fact that he remained ignorant enlarge his rights against others? The statute requires the judgment and execution to be matters of public record; the sale must be advertised by publication in a newspaper, and by posting notices in a number of public places in the township; it is made at the court house door; and return of it made to the clerk. After all that a year elapses for redemption by the owner or any one having a lien on the property. If the doing of all this does not charge those who are concerned with notice what is the use of doing it? Why is it required by the law if it is to have no effect? And what useful effect can it have unless it operates as notice in favor of those who pay their money on the faith of it?

With all this the views of the Court below appeared to be in harmony. Several of the cases which I have

quoted were cited in the opinion, with this conclusion based on them.

Upon the second point it is quite clear that the complainant might have compelled the sale of the other property of Bowser to satisfy the Stearns execution before resort to the property covered by this mortgage; but not having gone to the Courts for this relief the execution plaintiff was not bound to enquire into the equities in this respect and to direct the order of sale accordingly; and it follows that the sale is not void nor to be annulled on this account at the instant of complainant.

Notwithstanding this the Court said:

Nevertheless the complainant, as some of the cases just cited show, is not without remedy; but from the defendant who obtained an inequitable advantage by means of the sale as made, is entitled to compensation to the extent of that advantage—that is to say, to the extent of the value of the property so sold, not exceeding the amount due complainant upon his mortgage debt.

And in the concluding paragraph:

The report of the Master is perhaps not explicit on this point; but, as I understand, it is not questioned that the property of Bowser, which was purchased by Bass, and which ought to have been sold on the Stearns execution before resort to the lands mortgaged to the complainant, was worth, over and above all encumbrances created before the execution of complainant's mortgage, more than the amount due upon that mortgage, treated as a subsisting security, and, this being so, the decree here ought to be that the defendant pay the plaintiff, within a time stated, the amount due upon his mortgage, with stipulated interest to date of judgment, and that in default of this the sale to the defendant be annulled and the title of the complainant under his purchase be confirmed.

Here is the gravamen of my complaint against the the Master and the Court in respect to the vague and inconclusive character of their findings. What was the "inequitable advantage" to which they refer? In what facts did it consist? By what rule of law is it defined? Here was a valid judgment against Bowser; an execution which must be taken now as a valid writ; a levy on lands of Bowser liable beyond question to seizure and sale under that execution; and a sale in due form of law. Where is the inequitable advantage?

I will hunt for it as dilligently as a ferret hunts rats.

What seems to me to be the nearest approach to any statement of it is in the concluding paragraph of the opinion, and is, in substance, that property of Bowser which ought to have been sold on the Stearns' execution before resort to the lands mortgaged to Milmine, and which was worth over all encumbrances prior to the Milmine mortgage enough to pay that mortgage, had been sold to Bass.

In view of the express decision in a previous paragraph of the opinion that Stearns & Co. were not bound to inquire into the equities of subsequent encumbrancers in levying their execution it is hard to understand what the Court meant by reference to property of Bowser, which "ought to have been sold on the Stearns execution before resort to the lands mortgaged to the complainant." If these lands "ought to have been sold" in such sense that the failure to sell them invalidated any sale made under the Stearns execution of the lands mortgaged to Milmine, then the opinion is inconsistent with itself. It will not do to say that Stearns & Co. had a right to levy and sell in disregard of Milmine's mortgage, and then immediately add that the sale was invalid because other lands ought to have been sold first.

But it is specified in the opinion that the other property of Bowser referred to was purchased by *Bass*, and it is possible that it was intended to rest a distinction on that circumstance,—to hold that while the sale under the Stearns execution would have been valid if made to any one else, it would not be valid if made to Mr. Bass; and this, not because of any fraud or misconduct on his part at the sale or in connection with it, but because he had already purchased property of Bowser subject to the lien of the Stearns judgment sufficient in value to pay the Milmine mortgage. That is to say, the fact that he had purchased other property of Bowser, which, *upon a marshalling of assets would have been*

ordered to be sold to satisfy the Stearns judgment before sale of the lands mortgaged to Milmine, and *would have satisfied it*, disabled him from buying, although any one else in the world could buy, and take a good title.

All of which seems to me, at first blush, to be a very strained and fantastical theory.

Bowser had many creditors. Each one took his own way to collect his debt,—issued execution when he pleased, and levied it as he pleased. Mr. Bass made it his business to attend all these sales that came to his knowledge. At some of them he bought the property. The money paid by him went to the execution creditors.

According to the cases which I have cited, and the opinion of the Court below, this was all strictly within the right of the parties. Until some one took steps to settle the equities and marshall the assets every execution plaintiff was entitled to levy on any property covered by his lien. And so far as consummated, all these proceedings must be taken as valid.

That Mr. Bass shall be called upon now to account to some one else for the money paid by him at those sales; that it shall be treated as having been wrongfully paid to the persons who received it, and chargeable to him for the benefit of Milmine, is a notion too absurd to talk about.

One thing only remains to which I can imagine the language of the Court to apply. It is the supposed value of the lands purchased by Bass above the price paid for them by him. This means that those sales are to be treated as valid and binding in every respect except as to the price paid, but as to that a new bargain is to be made for Mr. Bass as purchaser on the basis of the opinions of witnesses,—a theory in itself quite as unreasonable and absurd as the other. A case is possible in which the purchaser at a judicial sale will be charged with the value of the property regardless of the price paid. But this can be only where the purchaser *violates*

some duty or obligation in the purchase. Such a case may arise between attorney and client, trustee and *cestui que trust*, or creditor and surety debtor. But in the absence of such special circumstances the price paid at a judicial sale must stand as the value of the property as between the buyer and all persons interested in or affected by the sale.

No such relation, however, existed between Bass and the other creditors of Bowser. He owed no one of them any obligation to be guardian of his interests. The Law itself invited him to attend the sales and bid in competion with all others. His bids stood open for a year after he paid his money to enable any one interested to redeem. If he made a profitable purchase what earthly right has Milmine to the benefit of it?

Mr. Bass's right in the property purchased must be fixed by the things which took place at that time. If the proceedings were according to law, his own conduct fair and open, and the price paid adequate to support a sale, no subsequent transaction can create any *ex post facto* liability against him. If he was not trustee for Milmine at the time nothing could make him one afterward in respect to that business.

And so we come back to the same old theory strenuously urged by the complainant, but condemned by the authorities and rejected by the Circuit Court, to the effect that the judgment creditors of Bowser were bound at their peril to ascertain and give effect to the equities of Milmine exactly as would be done by a Chancellor on a bill to marshall the the assets. If that obligation existed, and all the creditors who violated it, and all persons who purchased at their sales are answerable to Milmine as trustees for whatever came into their hands then there is a foundation in theory, (though not even then in fact,) for this decree. But the contrary is true, absolutely and beyond question. The Circuit Court declared it so, and yet, strangely enough, failed

to see that the principle declared was decisive of the whole case. Those prior sales were all valid. They were a year and a half before Milmine commenced his foreclosure suit. Nobody was thinking of him then. Bass's right to buy was as clear as the right of the creditors to sell. Upon no conceivable ground is he accountable for his profits to Milmine UNLESS, (I repeat it again) *all these proceedings were unlawful, and are subject to review now because they were not conducted as the Court would have ordered them on a bill to marshall the assets.*

But even upon this extreme and untenable doctrine of law the decree of the Circuit Court can not be supported. It was assumed for the purpose of the decision that Bass had purchased lands, which, upon an equitable marshalling of assets, ought to have been sold under the Stearns execution, worth enough, over all encumbrances prior to the Milmine mortgage, to pay that mortgage in full. The Master made no finding on the subject, and it is plain from the language of the opinion that the Court did not examine the evidence relating to it. To pick the facts out of the record is quite a task, as will appear. On page 136 of the record is a stipulation showing the lands owned by Bowser when the Stearns judgment was rendered. They comprised fifty-three parcels of very miscellaneous character. He had only a fractional interest in many of them, and more than half of them were village lots of small value. A stipulation on page 137 of the record shows sixteen transfers by Bowser between the date of the Stearns judgment and the issue of the *alias* execution. Of these, six were by deed, six by sheriff's sale at which Bass was the purchaser, three by sheriff's sale to other parties, and one by tax sale. Of the purchases by Bass one was made July 26, 1876; three December 23, 1876; one January 13, 1877; and one December 1, 1877. The only evidence I know of as to the amount paid by Bass

at these purchases is in his answer on page 34 and 35, and in the answer by Bowser on pages 58 and 59 of the record. It there appears that the aggregate amount of Bass's six purchases was $2,608.77. What was paid for the ten other conveyances does not appear in the record, so far as I remember. A stipulation on page 142 of the record shows that the liens prior to the Milmine mortgage amounted to $5,360.25. In this I have included a ratable proportion of the tax liens shown on page 144. The prior liens and Bowser's purchase money amounted, therefore, to $7,969.02. With the exception of one town lot of small value the property was all wild land. As to sixty acres of it a stipulation on page 138 places its value at $10 per acre. As to the remainder, three or four farmers who lived in the neighborhood, and doubtless thought well of lands in that locality, put it at $50 per acre. This would give a total valuation of $16,300, which would leave a margin over and above the liens prior to the Milmine mortgage of $8,331. On the ground of this supposed profit made by Bass in his prior purchases the Circuit Court required him to pay Milmine $10,878.

This concludes what I have to say in criticism of the opinion pronounced below. I think I have shown that upon the only points covered by it not expressly ruled for the appellant,—the irregularity of the issue of execution, and the supposed inequitable advantage, the Court was in error, and that the decree for the appellant can not be justified on those grounds.

In all I have said so far I have confined myself to the bill, and the complainant's case, without any reference to the answer, or the facts which support it. But without these the merits of the appellant's case can be but imperfectly appreciated.

Bowser and his partners, Falls & Prentiss, had been carrying on for some years a foundry and machine shop

in Fort Wayne. Bass was endorser for the concern. The financial trouble of the firm began in 1873, and came to a crisis in November, 1876. At that time Bass's liabilities as endorser was something over $22,000. On November 6th, Bowser executed to Bass, for his protection, a mortgage on all his individual real estate, and Prentiss and Falls a mortgage on their half of the foundry. Bowser had sold his interest in the foundry some time before, and had pledged $14,000 of notes received for it as collateral security for debts in bank, among which were part of those signed by Bass, but out of which only a small sum was ever realized.

When Bass came to look into the condition of the property after receiving these mortgages, he found it in inextricable confusion. All of the best parts of it were covered by mortgages—$6,000 on the homestead, (lots 116 and 117,) $20,800 on the foundry, and about $6,000 on the farm east of Fort Wayne. (To Milmine.) There were twenty-seven general judgment liens, aggregating about $10,000, and several thousand dollars of delinquent tax liens, making a total of about $48,000 of encumbrances, all prior to the mortgages given to secure him as endorser on bank paper for $22,000, which he shortly afterward paid. All these facts are detailed in the answer found in the record, page 29, *et seq.*, and nearly all of them are embraced in the stipulations found on pages 138, 142, 143 and 144.

In this situation the course determined upon by Mr. Bass is thus stated in his answer:

> And said defendant further answering says that when it thus came to his knowledge that there were $43,092.91 of liens upon the property mortgaged to him prior to his mortgages, it seemed to him that there were bnt three possible courses open to him, viz: to sit by and suffer his entire security to be exhausted in satisfaction of said prior liens, as it certainly would be, unless prevented by this defendant; or to advance himself the large sum necessary to redeem said prior liens; or to attend such sales as should from time to time be made by the various lien holders, and protect his interest in each piece of property sold by bidding on the same when necessary; that upon reflection the last

course seemed wisest and best, and was adopted; that he accordingly attended every execution sale that came to his knowledge of any of the property of said Jacob C. Bowser, and bid upon every piece of property so offered which had, in his judgment, any value above specific liens thereon prior to the lien upon which it was offered; that at all such sales this defendant was seeking only to protect his subsequent lien by preventing sacrifice of the property of said Bowser upon the prior liens; and that he did not seek, and did not have, as he believes, any advantage over any other bidder or creditor.

There can be no doubt of the right of Mr. Bass to adopt this course, or of its wisdom as the best policy for him. The sale of the property was inevitable. Every sale to another person at a full price was so much toward the application of the property to the payment of the liens prior to his. By attending the sales he could prevent any one else from buying at less than a full price. If he bought at less than a full price his profit was so much toward his indemnity.

Let us now consider for a moment the relative situations and rights of Stearns & Co., Milmine, and Bass.

They were all creditors of one debtor. Milmine and Bass were both junior creditors. Milmine's claim was subject to about $6,000 of prior liens; Bass's to about $43,000. Their claims were entirely independent in origin and they owed each other no special duty or obligation.

There is such a thing as a race of dilligence between creditors, which the law recognizes and approves. It is an old maxim that the law favors the dilligent creditor. In such a race each man is for himself, and "the devil for the hindmost." Of course, the game has its rules. Neither party must "hit below the belt," or, to make the figure consistent, trip, dig pitfalls, or throw dust. But the allowance of the race involves of necessity the right of every participant to secure his own, even to the exclusion of the others, if it happens so. This means that in the use of all lawful measures for the promotion of his interests every creditor shall have the benefit of his superior skill, alertness and energy, and the advan-

tage of the ignorance, indifference or blunders of his rivals.

Neither Stearns & Co. or Bass owed any duty to Milmine except the negative duty of non-interference. They had no right to mislead or deceive him by any word or act. But they were not bound to give him information, advice, or assistance. If he went to sleep, they were not bound to wake him up; if he made a blunder, it was not their duty to notify him of it. They had a right to ignore him altogether, and conduct their proceedings as though he had never been born, and his judgment never taken.

There was an attempt to argue upon the hearing below, which may be repeated here, that there was a sort of relationship of principal and surety between parcels of Bowser's land; that as to the Stearns judgment the land mortgaged to Milmine was *surety land*, and all the other *principal land*. But the cases which I have cited disprove any such doctrine, and show that until some one interested invokes the interference of the Court all the lands of the debtor are liable alike to the levy of execution.

There are, it is true, some analogies between the relations of creditor, principal and surety, and those of prior and subsequent creditors, and the property of their common debtor in court for administration. But there is also a wide dissimilarity between them; and it is in the very aspect of the matter here presented that such dissimilarity exists in most marked form. A man who takes another to be his surety-debtor enters voluntarily and by contract into a relation in which the law imposes on him certain duties toward the surety. By making the contract he undertakes to discharge those duties,—and chief among them, to exhaust the property of the principal before taking that of the surety, and to preserve and apply faithfully any collaterals of the principal that may be placed in his hands. In such a

case the creditor engages in a certain sense to be the protector of his surety-debtor. For that engagement he has a consideration in the obligation of the surety-debtor to him.

But what has the senior creditor to do with those who come in after him as creditors of his debtor? What right have they to thrust obligations on him without his consent? He has no contract with them; he receives no consideration from them; he has nothing to say as to the number of them or the amount or character of their claims. He is not bound to know of their existence or direct his course with any reference to their interests. At the same time, it may happen there is a way in which his money can be made with less prejudice to their interests than in any other way. And when they bring him and the assets into court in order to accomplish that purpose, the Court, in administering the assets will follow the analogies of the law of principal and surety, so far as they are applicable. That is, the property which is to be sold first to pay the senior creditor's claim will be regarded as occupying the place of a principal, and that which is to be sold last as in the place of a surety. But the attempt to push these limited analogies to the extent of applying them to the original relations of all the creditors of a common debtor is without the warrant of logic or authority.

If these views are sound it follows:

1. That if Stearns & Co., and Bass simply let Milmine alone to take whatever course he pleased, he can have no ground of complaint against them. And that is precisely what they did. Not a word passed between them.

2. It follows also, that if Milmine, by his own indifference or negligence omitted to assert rights which he could have claimed, or to take steps which he could have taken, and by that means abandoned to Stearns & Co. property on which they had a sight to levy and which Bass had a right to buy in the absence of timely

objection by him, he can not repair his mistake at Bass's expense.

And this, again, is precisely what occurred. He first neglected to do what he might have done, then blundered in what he undertook to do, and finally went to sleep. In his suit for the foreclosure of his mortgage he named fifty-five parties defendant besides the mortgagors, intending, apparently, to bring in all the judgment and mortgage lien holders. He could have obtained an order in that suit by proper averments and proceedings for the marshalling of the assets according to his right, whatever that was. But he neither asked that relief, or made the allegations necessary to authorize it. He contented himself with the untrue averment that all the outstanding liens were junior and inferior to his. (Rec. page 120.)

But with all the parties brought into court he did not bring in Stearns & Co. I suppose that was an oversight. But the consequence of it was exactly the same, whether it was accidental or intentional;—the prior lien of the Stearns judgment was not foreclosed or effected by the decree.

Bass was made a party and served with process. And there was a faint show of argument below that he was bound by the decree in such sense as to affect the validity of his purchase under the Stearns execution. But that view was not adopted by either the Master or the Court, and is manifestly untenable. At the calling of the case Bass's attorneys, who had general authority to appear where his interest seemed to be involved, entered his appearance. He was at that time the holder of the mortgage given to him by Bowser, Nov. 6, 1876, which included the land described in Milmine's mortgage. He was therefore a proper party defendant, and the allegation of the complaint that his lien was junior to Milmine's was true. On July 8th his appearance was withdrawn and default entered against him. The sale on the Stearns execution was Aug. 3rd.

That such default and the judgment based on it would not effect an after acquired title is well settled. *Unfried* v. *Heberer*, 63 Ind., 67; *Martin* v. *Noble*, 24 Ind., 216; *Murray* v. *Ebright*, 50 Ind., 362; *Thompson* v. *Johnson*, 60 Cal., 292; *Morrison* v. *Walker*, 22 Tex., 18; *Alston* v. *Alston*, 34 Ala., 15; *Rutledge* v. *Van Meter*, 8 Bush, 354.

Immediately after his decree Milmine issued execution and bought in the property for the amount of his judgment and costs, and then

"the subsequent proceedings
Interested him no more."

By the law of Indiana he could have redeemed from the Stearns sale at any time within a year. Such a redemption would have subrogated him to all the rights of Stearns & Co., and would have put into his hands the ample resources for making his money which he now says were available to them. He says he did not know of the sale until it was too late to redeem. But that was his own fault. The sale was advertised and posted in regular form, publicly made, and duly spread on the record. He had all the means of knowledge that anybody ever has of a sheriff's sale. It was no one's duty to tell him of it. His failure to find it out can give him no rights against any one else.

It is by no means certain that Milmine has lost anything by all that has happened. The land described in his mortgage was subject to prior judgments amounting to nearly $6,000. He says there was other property enough to pay them. Perhaps there was. But that fact did not pay them. If Milmine had been alive to the situation he could have made the other property pay the prior judgments by attending the sales and bidding enough for that purpose. But whether he would have done so or not we do not know. And unless he had, things would have turned out just as they have, so far as we can tell.

But whatever Mr. Milmine has lost, if he has lost

anything, in his race with Stearns & Co. and Bass, has been lost in consequence

1. Of his omission to ask for any marshalling of assets.

2. Of his omission to make Stearns & Co. parties to his suit for foreclosure.

3. Of his omission to inform himself of the sale on the Stearns execution.

All these were matters on which no one was bound to give him any information. More than that, they were matters in respect to which Stearns & Co., and Bass, as creditors of the same debtor, themselves struggling by the dilligent use of lawful means to secure their own claims, were entitled to the benefit of his negligence and his blunders. Watchfulness of the course of events, carefulness in the drawing of papers and sagacity in the choice of remedies are things that enter into the race. And when a man has lost the race by neglect of these will the Court step in to crown him victor for what he might have done?

A very slight change of circumstances would have changed the present case very materially. If there had been such relations between Stearns & Co., and Bass, or either of them on one side, and Milmine on the other as would have imposed upon the former any duty of protection toward Milmine, such as exists between a trustee and his *cestui*, or a creditor and his surety-debtor, for example, the case would be a different one. Or if anything had been done to mislead Milmine, conceal the levy or sale from him, or prevent him from taking any steps that might be material to his interest; or if Milmine had been a woman, unfamiliar with business, and unable to protect her rights, we would have a different case before us. But here were two strong, capable, self-reliant business men standing on equal ground as creditors of the same bankrupt debtor, each entitled to use all the resources of the law to secure himself even at the expense of the other. Milmine got the worst of it,

not in consequence of any unlawful or wrongful act of Stearns & Co. or Bass, but solely in consequence of his own neglect. Equity can do nothing for such a man without ceasing to be equity.

In the statement of the case contained in the opening part of this brief I quoted on page 4 *ante*, a portion of the Master's report to which I have not since alluded. There was no reference to the subject in the opinion of the Court, and I do not know that the point will be urged here, but it will not be amiss to notice it.

It was charged in the bill that Bass caused the levy on lots 116 and 117 to be abandoned, and the *alias* execution to be issued and levied on the lands covered by the Milmine mortgage, and on this subject Bass was specially interrogated in the bill. He answered fully and to the effect that he had nothing whatever to do with the levy on lots 116 and 117, or the release of that levy, or the issue of the *alias* execution, or the levy of that execution on the land in dispute, and that when he bid at the sale it was with no intention or expectation of cutting out Milmine's mortgage, but with the full expectation that Milmine would redeem. The Master did not find in form that the allegations of the bill in this particular were either true or false, but he ventured to say that he was "inclined to the opinion" that the testimony of a certain witness, Mr. Stratton, on this subject was substantially correct. Of course all this gingerly feeling round about the case means nothing unless it is taken as a finding that Mr. Bass did some wrongful act in connection with the levy of the Stearns execution.

Taken in this sense I have to say, first, that the finding is in flagrant disregard of the evidence. The sworn answer requires more than the evidence of one witness to overcome it. Besides that, there is the testimony of the one man who knows more about the matter than any one else, and who is quite as disinterested as Mr.

Stratton,—Mr. John L. Farrar, who was the attorney for Stearns & Co. His two depositions will be found in the record, page 64 to 71,—the first taken by the complainant, the second by the defendant. He testifies explicitly that the release of the first levy, the issue of the *alias* execution, and the levy on the land in dispute were all by his own sole direction.

In contrast with this the testimony of Mr. Stratton is of the sort universally regarded by the law as most open to mistake and error,—casual conversations and statements made five or six years before. He confounds together things which must have been said in 1877, if said at all, with things that could not have been said until 1879. To say that his testimony outweighs the answer and the testimony of Farrar is to ignore all recognized rules of evidence.

But suppose we pass all that, and assume for the argument's sake that Mr. Bass did propose to Stearns & Co. that they should abandon their levy on lots 116 and 117 and levy on the land in dispute, and promise that if they would do so he would bid at the sale, Where was the wrong of it? Let us try to blow away this fog and see something clearly. The relation of Mr. Bass to the business was understood by all the creditors. It was known that he had a large claim which he could secure only by getting the prior liens out of the way. The prior creditors had him in their power. They could compel him to bid, or buy, or lose. Was it wrong under the circumstances for Stearns & Co. to solicit a bid from Mr. Bass on lots 116 and 117? Was it wrong for him to say that he would come to the sale and bid? Was it wrong for him to decline to bid when he found the lots encumbered to their full value? If after repeated failures to sell, Stearns & Co. had a right to abandon the levy, was it wrong for another person to advise them to do so? If they had then a right to levy on the land in dispute was it wrong for another to sug-

gest to them to do so? Can it be a legal wrong for one person to advise or procure another to do an act, which he has a legal right to do?

There is no room for any charge of fraud in the whole matter. Here were certain acts done. Their legal validity is a proper subject of inquiry. If the second levy was void because there had been no sale under the first one, then the sale was void, and would have been void if Mr. Bass had never heard of it. If the sale was void because all the other property of Bowser was not first exhausted, it would have been equally void if Mr. Bass had never been born. *The legality of the things themselves* is the matter in question. If all the steps taken by Stearns & Co. to collect their debt were lawful things for them to do of their own motion, no fraud can be imputed to another for advising, persuading, or procuring them to take those same steps.

And so we come back, again and again, to the one and only question in the record,—Was the levy on the land in dispute void because of Milmine's unasserted right to have the other property of Bowser first exhausted? When the Circuit Court decided this question in the negative there was nothing left in the case.

I have spoken of the right of the appellant in this case in terms no stronger than I believe to be just. But no lawyer is wise enough astronomer to predict his own eclipses. And if it should happen that the Court shall cast the shadow of its adverse decision upon my client a minor, but not unimportant question remains as to the terms of the decree.

It was held by the Circuit Court that the purchase by Bass, although inequitable as against Milmine, subrogated him to the rights of Stearns & Co. under their judgment, and so vested in him a right to redeem the Milmine mortgage. That this was a necessary consequence of the view taken by the Court of the sale can

not be questioned. As to the prior lien of the Stearns judgment the Milmine mortgage has never been foreclosed. The vacation ot the sale necessarily leaves the judgment unsatisfied and the right of redemption still subsisting. In that aspect of the case the only question is as to the terms of the redemption.

Milmine's mortgage was to secure a note dated June 1, 1875 for $4,844.19, due three years from date, with "ten per cent interest from date, payable annually until "paid." At the date of this note it was lawful to contract in writing in Indiana for interest at any rate not exceeding ten per cent. The rule adopted by the Supreme Court in Indiana is to allow interest as damages after the maturity of the paper at the same rate expressed in it. *Shaw* v. *Rigby*, 84 Ind., 375.

The rule in this Court is to allow the rate fixed by the local law after the maturity of the paper, *Holdern* v. *Trust Co.*, 100 U. S., 72. In Indiana that rate is six per cent. Unless the words "payable annually until paid" are to be construed to mean that the rate of interest is to be ten per cent. after maturity, that would be the rule to be applied here. And that does not seem to me to be the force of the words. It must be taken that the parties contemplated the payment of the note at maturity, and the language used must be contrued as applying to the time preceding that date, unless it clearly appears that they intended to provide a rule of damage to be applied after default. And the words "payable annually until paid" can be taken to refer quite logically to the time preceding the maturity of the note.

Calculated at ten per cent. for three years, and six per cent. after that, the amount due on the note December 14, 1886, which was the date of the decree, was $9,851. Calculated at ten per cent. for the whole time the amount due was $10,432.48. The amount decreed by the Court was $10,878.00. (Rec. page 173.)

The record shows that during the pendency of his foreclosure suit Milmine bought in an outstanding tax title for $212.70, which was added to the amount of his mortgage. (Rec. page 131.) If Bass is required to redeem Milmine would have a right to have this included. The amount of it, counting interest from September 1, 1878, which is as early a date of purchase as can be inferred from the record, (*vide* Clem's Cross Bill on page 125) would be $318.45. This added to the sum due on the note at ten per cent. would make $10,750.93,—a sum not greatly variant from that fixed in the decree. But if it is the intention of the decree that the redemption shall include the tax title it should so state in terms, otherwise it would cover only the mortgage.

R. S. TAYLOR.

BELL & MORRIS,
Of Counsel.

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Supreme Court of the United States.

JOHN H. BASS *vs.* GEORGE MILMINE.

BRIEF FOR APPELLANT IN REPLY.

I submit the following in reply to the brief filed for the appellee.

The greater part of it is taken up with the discussion of two propositions expressly decided by the circuit court adversely to the appellee, viz: (1) That the sale was void because the clerk failed to endorse on the execution two payments which had been made; (2) that the judgment was discharged as to Bowser & Co. by extension of time to Gardner, Blish & Co. As to these issues the appellee attacks the decision of the circuit court. This, I submit, he cannot do. This appeal brings up for review only that which was decided adversely to the appellant.

London *vs.* Taxing District, 104 U. S., 771.
Kelsey *vs.* Western, 2 Comstock, 500, 505.

It will be said, perhaps, that the grounds stated in the opinion are but reasons for the decree, and that the appellee is at liberty to show that the court gave a bad reason for a good judgment; and sometimes, no doubt, that may be so. But the findings of the court on these points are not mere argument. They are decisions of issues made by the plead-

ings. Unless the opinion of the court set out in the record has the force and effect of a finding of the law and facts, there is no finding of any sort in the record to support the decree.

Nevertheless, I will reply briefly on those points.

First, as to the facts. The judgment was May 13, 1873, for $2,212.85. The payments are shown on page 117 of the record, and the following is a full statement of the account to the date of sale, interest being computed at 6 per cent.

Judgment, May 13, 1873	$2,212 85
Interest to December 31, 1873	84 05
	2,296 90
Paid December 31, 1873	354 93
	1,941 97
Interest to January 7, 1874	2 24
	1,944 21
Paid January 7, 1874	145 07
	1,799 14
Interest from January 1, 1877 (to which date it was paid), to August 3, 1878	171 47
Due August 3, 1878	$1,970 61

The sheriff's return on page 86 shows that to $44.10 of costs endorsed on the execution $44.40 were added by the sale, and that the amount received by Stearns & Co. was $1,911.50, being $59.11 *less than the amount due on the judgment.*

It is true that Gardner, Blish & Co. paid 10 per cent. interest on the judgment until January 1, 1877; but that fact does not appear in the receipts or papers and was not known to Bass, or, so far as appears, to Bowser either; and if it had

been, Bass could have done nothing about it. It was not for him to say what interest Gardner, Blish & Co. should pay to their creditor.

As to Bass' knowledge of the payments of $354.93 and $145.07, the only direct evidence is that of Mr. Bass himself, who swears that he did not know anything about them. Counsel argue (1) that the judgment docket showed the payments; (2) that that record was legal notice to Bass; (3) that as Bass states in his answer that he caused an examination to be made of Bowser's titles, he must have known of the payments in fact.

To which it may be answered:

1. That Bass was not bound to examine the judgment docket. He was bound to know that there was a *judgment* and an execution, but he did not need to examine the *judgment docket* to know that. The record of the judgment is a different thing. He had a right to presume that the officer issuing the execution had done his duty.

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5. Finally, it is well settled that a sale upon a *partially satisfied judgment* is not void but irregular only.

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The other ground upon which the appellee attacks the decree of the circuit court is that Stearns & Co. extended time to Gardner, Blish & Co. without the consent of the firm of J. C. Bowser & Co. That a consent was given in the firm name by J. C. Bowser is admitted; but it is said that he had no power to bind his partners, and that the extension was, therefore, without their consent.

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possible inference is that the judgment was for a firm debt, and that Bowser had power to bind the firm by his agreement.

But whether that be true or not, it is certainly true, as was decided by the circuit court, that the extension was granted by Stearns & Co. upon the "*supposed consent* of Bowser & "Co.; and if Bowser's partners were not bound by that con- "sent, the agreement to extend was never binding, and exe- "cution might have issued at any time."

There runs throughout the brief for the appellee what seems to me to be an unwarrantable assumption as to the legal bearing upon the case of the value of the property purchased by Mr. Bass, and also an extravagant assumption as to what those values were. It is assumed by counsel that the land in dispute—a farm of 123 acres—was worth $25,000. That is a little over $200 per acre. On this point his own testimony is as follows:

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Upon a similar distinction Simon Edsall (pages 103, 104) put the land at $100 for farming purposes and $200 for speculative purposes.

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the sale—there remained on that side of Fort Wayne two hundred acres of vacant land inside the city limits.

All these witnesses except Goshorn were called by the plaintiff. It seems to me that upon any conservative and reasonable construction of their testimony it is impossible to place the value of the land in controversy in 1878 at more than $100 per acre, or $12,300.

It is familiar experience to us all that there is no other subject upon which witnesses will give such wild testimony as upon values. As to this farm, the plaintiff's witnesses varied from $67.50 per acre to $300. In respect to lots 116 and 117 they varied from $7,200 to $16,000.

But suppose all these inflated estimates be taken as actual values, and that the truth is, as figured up by counsel, that, taking all the sales of Bowser's property together, real estate worth $127,485 was sold for $65,264, how can it affect the rights of parties here? Is it not within the experience of all those familiar with such things that property rarely brings its full value at a judicial sale? Yet it must be sold. Bowser's property had to be turned into money. The law has no way to accomplish that end except to offer it to the highest bidder; and it is the truest kindness to the owners of such property and all persons interested in its bringing a good price to hold the buyer secure in what he buys against all objections that do not go to the essence of the sale.

Suppose the conditions which counsel seek now to attach to these sales had been announced beforehand—that purchasers would be liable to be called to account for all the property should be found to be worth in order to protect the equities of other creditors who were doing nothing to protect themselves—would anybody have bid upon such a "pig in a poke?"

Milmine bid in the property in dispute for $7,048.70—less than one-third of what he now says it was worth. Will he have any scruples about keeping it if this Court decrees it to him? His counsel talk of the iniquity of the payment of

interest to Stearns & Co. by Gardner, Blish & Co. at ten per cent. Will he hesitate to accept that rate upon his mortgage debt for fifteen years past if this Court should award it to him, as the circuit court did?

In his own proceedings he is entirely willing to treat Bass and Bowser and Stearns and all the rest as his antagonists, and get what he can and keep what he gets from them; but when he loses a point by his own supineness and neglect he comes to the Court with the claim that Bass should have been his protector.

Herein lies the fundamental weakness of all the appellee's arguments and authorities. If there had been any duty resting upon Stearns & Co. or Bass to take care of Milmine's interests for him, it may be that he would have just ground of complaint against Bass. The total absence of that duty takes away the relevance and force of nearly all that is urged here in his behalf.

Upon that distinction the cases cited by counsel are all, with one exception perhaps, reconcilable with the cases relied on by the appellant.

Of this distinction the case of *Wise* vs. *Shepherd* (13 Ill., 41) is a good illustration. The point of the case is difficult to state concisely, but I will try to make it plain: Shaw and Price owed Ross a debt, Shaw being principal and Price surety. On this debt Ross took separate judgments against the two debtors. Subsequent to these judgments Price mortgaged his land to Gibson, who foreclosed. Shepherd purchased at the sale. This put Shepherd in Price's shoes as owner of the land, subject to Ross's judgment. In the meantime Wise took judgment against Shaw and bought Ross's judgments against Shaw and Price. He then sold out Shaw on his own subsequent judgment, and Shepherd (the grantee of Price) on the Ross judgment. This the court held he could not do.

And the reason is very plain. When Wise purchased the Ross judgments he became the creditor of Shaw, and of

Shepherd as the owner of the Price land. Shaw was his principal debtor, the Price land purchased by Shepherd his surety debtor. He *owed the obligation to Shepherd* which a creditor by his voluntary act assumes toward his surety debtor, *to protect him* to the extent of exhausting the property of the principal before taking that of the surety. To sell out Shaw on another and subsequent judgment and then proceed against the surety was a violation of that duty. And that duty is the element wanting in this case.

R. S. TAYLOR.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 285.

JOHN H. BASS

vs.

GEORGE MILMINE.

BRIEF FOR APPELLANT IN REPLY.

R. S. TAYLOR.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

JOHN H. BASS *vs.* GEORGE MILMINE.

BRIEF FOR APPELLANT IN REPLY.

I submit the following in reply to the brief filed for the appellee.

The greater part of it is taken up with the discussion of two propositions expressly decided by the circuit court adversely to the appellee, viz: (1) That the sale was void because the clerk failed to endorse on the execution two payments which had been made; (2) that the judgment was discharged as to Bowser & Co. by extension of time to Gardner, Blish & Co. As to these issues the appellee attacks the decision of the circuit court. This, I submit, he cannot do. This appeal brings up for review only that which was decided adversely to the appellant.

London *vs.* Taxing District, 104 U. S., 771.
Kelsey *vs.* Western, 2 Comstock, 500, 505.

It will be said, perhaps, that the grounds stated in the opinion are but reasons for the decree, and that the appellee is at liberty to show that the court gave a bad reason for a good judgment; and sometimes, no doubt, that may be so. But the findings of the court on these points are not mere argument. They are decisions of issues made by the plead-

ings. Unless the opinion of the court set out in the record has the force and effect of a finding of the law and facts, there is no finding of any sort in the record to support the decree.

Nevertheless, I will reply briefly on those points.

First, as to the facts. The judgment was May 13, 1873, for $2,212.85. The payments are shown on page 117 of the record, and the following is a full statement of the account to the date of sale, interest being computed at 6 per cent.

Judgment, May 13, 1873	$2,212 85
Interest to December 31, 1873	84 05
	2,296 90
Paid December 31, 1873	354 93
	1,941 97
Interest to January 7, 1874	2 24
	1,944 21
Paid January 7, 1874	145 07
	1,799 14
Interest from January 1, 1877 (to which date it was paid), to August 3, 1878	171 47
Due August 3, 1878	$1,970 61

The sheriff's return on page 86 shows that to $44.10 of costs endorsed on the execution $44.40 were added by the sale, and that the amount received by Stearns & Co. was $1,911.50, being $59.11 *less than the amount due on the judgment.*

It is true that Gardner, Blish & Co. paid 10 per cent. interest on the judgment until January 1, 1877; but that fact does not appear in the receipts or papers and was not known to Bass, or, so far as appears, to Bowser either; and if it had

been, Bass could have done nothing about it. It was not for him to say what interest Gardner, Blish & Co. should pay to their creditor.

As to Bass' knowledge of the payments of $354.93 and $145.07, the only direct evidence is that of Mr. Bass himself, who swears that he did not know anything about them. Counsel argue (1) that the judgment docket showed the payments; (2) that that record was legal notice to Bass; (3) that as Bass states in his answer that he caused an examination to be made of Bowser's titles, he must have known of the payments in fact.

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R. S. TAYLOR.

SUPPLEMENTAL.

By leave of the Court the following is added to the foregoing brief, which was filed in unfinished form before the opening of the argument:

The case of *James* vs. *Hubbard*, 1 Paige, 228, relied upon by the appellee, is also distinguishable from the present case. In that case Hubbard had a judgment covering a tract of land which had been divided and sold to different parties. James, the plaintiff, owned the parcel sold first. Berry (whose heirs were made defendants) owned one of the parcels subsequently sold. James made an effort prior to the sale to procure an injunction against the sale of his land, but it was denied on the ground that the judgment plaintiff's lien was about to expire and would be imperiled by the delay. At the time of the sale, and before it took place, he offered to bid the whole amount of the judgment for the land conveyed subsequently to his own; but that offer the execution plaintiff refused to accept. He then demanded that the lands be sold in the inverse order of their alienation. This order was pursued until the land conveyed to Berry was reached. Berry then made an arrangement with the execution plaintiff by which, on the giving of an indemnity bond by Berry his land was not sold at all. Then the land of James was sold. All the parcels were bid in by the execution plaintiff.

Before the purchaser had obtained his deed James brought his suit. It was an immediate transfer to the court of a controversy begun at the sale. Berry made the issue there with James by giving his indemnity bond to the execution plaintiff. That issue the court decided in favor of James by holding that Berry's land was liable to sale before the

land of James, the first alienee, and ordering it to be sold; and it was ordered that in case the Berry land should not bring enough to discharge the amount bid on the land of James he should have leave to redeem the balance.

Hubbard had not received his deed from the sheriff when the suit was brought. James had then a right to redeem without any order of court to authorize it. All he got by the decree was the order that Berry's land should be sold for his benefit, and this he got by a timely application in the nature of a bill for the marshaling of assets.

Moreover, the execution plaintiff's refusal to accept the bid of James of the whole amount of the judgment for the subsequently conveyed lands put him in the position of a willful wrong-doer. It entitled the court to lay its hand upon his incomplete purchase in any manner necessary to protect the rights of James as fully as could have been done under a bill to marshal the assets before sale.

Furthermore, the court in that case took no account of the value of the subsequently conveyed lands purchased by Hubbard. An inquiry was ordered as to the value of a parcel released from the judgment lien by Hubbard, but he retained the lands bought at the price bid. According to the theory of the appellee, he should have been held accountable for the value of those lands for the benefit of James, regardless of his bids.

In the course of the opinion the court said, in reference to the point made by counsel that a marshaling of the liens could be had only by a resort to the equitable power of the court in the first instance: "I am not aware of any case "where it has been held that the creditor must, at his peril, "decide upon the equitable rights existing among the hold-"ers of different portions of the property on which he has a "general lien for the satisfaction of his debt."

Is it to be supposed that Chancellor WALWORTH intended to establish a rule in that very opinion for which he says there was no precedent? Then he did not intend to estab-

lish the rule which the appellee asks the court to enforce in this case.

Finally, and most important of all, he acted upon the contrary rule. The case before him showed that *some parcels of land conveyed after that owned by James were not sold on the execution.* According to the appellee's contention, he should have held the sale of James' land void for that reason; but he did not. He held it valid. He would not have required James to redeem from a void sale. So that this case, upon the point here in dispute, is an *authority for the appellant.*

Gouverneur vs. *Lynch*, 2 Paige, 300, cited by the appellee, was a suit for foreclosure. The mortgage premises had been divided and sold to different persons subsequent to the execution of the mortgage. The court ordered the master to sell the parcels in the inverse order of their alienation. If Milmine had asked for a marshaling of assets in his suit for foreclosure this case would have been in point to support his right, but it has nothing to do with the question here.

The same remark is true of *Guion* vs. *Knapp*, 6 Paige, 35. It was a suit for foreclosure, and all the questions arose upon an inquiry into the equities of the parties in the first instance.

The case of *Dorr* vs. *Shaw* is doubly irrelevant, in the fact that it was also an inquiry into the equities of the parties upon an application for an injunction before a sale, and the further fact that the only thing decided by the court was that where a creditor holds *two different debtors* bound for the same claim the court will not compel him to make his money out of one at the mere instance of a creditor of the other.

This disposes completely, I think, of all the cases cited in support of the proposition that the sale in dispute was void because other lands of Bowser's subject to the judgment lien were not first exhausted, except *Clowes* vs. *Dickenson* (5 Johns. Ch., 235), which comes more nearly to the question here to be considered.

That was an aggravated case of oppressive abuse of legal

process. The plaintiff, Clowes, was the first grantee of part of the lands of a judgment debtor, Vanderheyden. Subsequent to his purchase other judgments were taken against Vanderheyden. Subsequent to that the unsold lands of Vanderheyden, which the plaintiff had an equitable right to have applied upon the prior judgment before resort to the land purchased by him, were sold to the defendant Dickenson upon the younger judgments; *but that sale was made expressly subject to the prior judgments.* Dickenson then purchased the prior judgment and sold the plaintiff's land under it. Under those circumstances the court held that the sale was inequitable.

If Mr. Bass, in the purchase of lands of Bowser sold before the sale here in question, had *agreed to pay the Stearns judgment as part of the consideration of his purchase,* and then, in violation of his agreement, purchased that judgment and enforced it against the land covered by Milmine's mortgage, the case would be on all fours with the case before the court.

But there is no such case as that here. Mr. Bass had purchased lands of Bowser which were subject to the Stearns and other prior judgments, but he entered into no undertaking to pay those judgments. There is no practice in Indiana of making judicial sales subject to prior incumbrances in any other sense than that the prior incumbrances remain unaffected by the sale. The purchaser takes his chances of having to pay them, but assumes no obligation to do so. At the time of Bass' prior purchases there were other prior judgments besides Stearns' in force, and other property of Bowser's remaining unsold. So far from being under any obligation to pay those judgments, *one of his rights was to secure the payment of them out of the other property of Bowser if he could,* including the land mortgaged to Milmine as well as any other.

If this decision is construed as resting upon the special equity created by Dickenson's purchase under circumstances

which made the payment of the prior incumbrances part of the consideration, then it is not in point here for want of any such equity in this case. If it is construed as holding broadly that the court will interfere after the fact to set aside a sheriff's sale in any case where the equities which would be regarded in a proceeding to marshal the assets have been disregarded in the levy, it stands alone in opposition to all the other cases on the subject.

The appellee's last reliance will be that although everything may have been legal in itself—judgment, writ, levy, and sale—yet it was the result of a fraudulent conspiracy. In what could such a conspiracy consist? Suppose Mr. Bass had told Milmine in advance that Stearns & Co. were about to levy their execution on the land covered by his mortgage, and that he was himself intending to bid at the sale, and that Milmine had responded, "If you do I will set your sale aside," and then all things had gone on as they did and the record stood just as it does, only with that fact inserted, would there be any room for a charge of fraud? If not, then the fraud must have consisted in not telling Milmine what was going on.

But if neither Stearns & Co. nor Bass owed him any duty to tell him, how could their silence be a fraud? How can there be an unlawful conspiracy to do a lawful act or to omit an act which there is no obligation to do?

R. S. TAYLOR.

Supreme Court U. S.
FILED.
APR 16 1890
JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States.

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JOHN H. BASS

vs.

GEORGE MILMINE.

BRIEF FOR APPELLEE.

L. M. Ninde,
Thos. E. Ellison,
For Appellee.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

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JOHN H. BASS *vs.* GEORGE MILMINE.

BRIEF FOR APPELLEE.

The appellee filed his bill in the court below to set aside a sheriff's sale, of the property in controversy, to the appellant and to quiet the appellee's title thereto. The facts involved in the argument of the questions in this Court are:

J. C. Bowser owned the land in controversy and mortgaged the same June 1, 1875, to David Smith to secure said Bowser's note to Smith for $4,885.19, which was assigned to appellee by Smith's executors; that said mortgage was duly recorded in the proper recorder's office the day it was executed; that said assignment was made on August 1, 1877, and recorded on the margin of the record of said mortgage on the 4th of August of the same year; that the appellee filed his complaint in the Superior court of Allen county to foreclose said mortgage on June 5, 1878, making the appellant and many others holding liens upon Bowser's property defendants. To this suit Bass entered his appearance on the 1st day of July, 1878, and on the 8th of the same month withdrew said appearance and was defaulted.

On the 24th of January, 1879, the appellee took his decree of foreclosure, and a certified copy thereof being issued to the sheriff, the appellee purchased said property at the sheriff's sale on the 1st day of March, 1879, and, after the year of redemption, the same was conveyed to the appellee

by the sheriff. This constitutes the appellee's title to property in controversy.

On the 12th May, 1873, Hermann Stearns *et al.* recovered a judgment against Gardner, Blish & Co., principals, and Jacob C. Bowser, Daniel M. Falls, and Joseph R. Prentis, partners under the firm name of J. C. Bowser & Co., sureties, for $2,212.85 and $4.70 costs.

On this judgment the principal debtors made the following payments:

December 31, 1873	$354 93
January 7, 1874	145 07

Interest paid till May 1, 1874.

Interest paid till January 1, 1877.

See printed Record, p. 77.

On this judgment an execution was issued to the sheriff of Allen county on the 12th day of June, 1877, and levied by him on lots 116 and 117, in the original plat of Fort Wayne. Said property was offered for sale and the execution returned for want of bidders.

On said *fi. fa.* there were two offers to sell, one on 21st July, 1877, and one on September 21, following.

The judgment plaintiffs had made no effort to exhaust the principal debtors prior to these offers.

See printed Record, p. 79.

On the 9th October, 1877, an execution was issued on this judgment to the sheriff of Miami county, where the principal defendants resided, and was returned by him on 25th of October of the same year unsatisfied and no property found whereon to levy.

See above reference.

On 26th of November, 1877, a *vendi.* was issued, commanding the sale of said lots 116 and 117, and the sheriff offered said lots for sale on 22nd of December, 1877, and returned

the property unsold for want of bidders. This *vendi.* and return were filed April 3, 1878.

See printed Record, p. 81.

On the 5th of July, 1878, another *vendi.* was issued, and on the 6th returned and the levy released.

Printed Record, p. 83.

And on the same day a *fi. fa.* was issued and levied on the land in controversy, and it was advertised for sale, and sold to Bass, the appellant, on the 3d day of August, 1878.

The year of redemption expired and the sheriff conveyed the premises to the appellant. Upon these proceedings the appellant depends for his title.

The appellee attacks this title as unconscionable, inequitable, irregular, and void.

To give this attack its full force the following additional facts should be also considered:

This Stearns judgment was rendered on the 12th of May, 1873, and thereafter drew 6 per cent. interest.

On page 141 of printed record appears stipulation No. 2. By this stipulation a letter from the plaintiffs in the Stearns judgment to J. C. Bowser & Co. is put in evidence as true. By this letter it appears that the judgment was rendered against J. C. Bowser & Co. on their acceptance, dated on the 22d of January, 1873, and that interest was paid thereon till January, 1877, at ten per cent.

At the date of this acceptance the following statute was in force in Indiana:

"Interest on a judgment or decree for money shall be from the date of signing, until the same be satisfied, at the rate per cent. agreed upon by the parties in the original contract, not exceeding 6 per cent.; and if there was no contract by the parties as to interest, then at the rate of 6 dollars a year on one hundred dollars."

On the 5th of February, 1873, the following statute was passed:

"That all judgments on contracts hereafter rendered shall bear the same rate of interest expressed in the contract upon which such judgment is rendered. The court rendering such judgment shall specify therein the rate of interest which the same shall bear: *Provided*, That when no rate of interest is expressed in such contract or a greater rate is expressed than 10 per cent. per annum such judgment shall bear interest at the rate of 6 per cent. per annum: *Provided, That the provisions of this act shall not apply to contracts heretofore made.*"

Both these statutes prohibit a greater rate of interest than 6 per cent. on this Stearns judgment.

In consonance with the rule established by these statutes, the plaintiff in the Stearns judgment issued three *fi. fas.* and two *vendi's* upon said judgment and caused the clerk to endorse upon each one, "Interest, six per cent.," counting interest at that rate and making no deduction for the 4 per cent. excess of interest paid from the date of the judgment till the 1st of January, 1877, the amount due on the judgment to the 6th of July, 1878, when the last *fi. fa.* issued, was $1,959.23, or $450.55 less than it was issued for; but if this excess of interest is also deducted the amount then due on the judgment was only $1,698.63, or $711.15 less than it was issued for. The basis for these calculations all appear in the endorsements on the writs issued upon this judgment and on the judgment docket, and were notice to Bass, even if he had no actual notice thereof. The credits were attached to and entered upon the judgment docket, as shown by the deposition of Karns.

See the master's abstract of Karn's testimony, printed Record, 158.

Bass was bound to know the condition of the record of the judgment and of the process issued thereon.

The State *ex. rel.* Sage *vs.* Prime, 54 Ind., pp. 450, 459, and 460.

This record, the executions issued thereon, and the sheriff's returns constitute the chain of title to the property he purchased and upon which he now relies. He states in his deposition (printed Record, p. 156) that he intended to purchase said lots 116 and 117. He at the same time owned the prior liens thereon. He consulted with Stratton about the sale and promised to bid them in at the sheriff's sale. The writ upon which he purchased the property in controversy was erroneous upon its face. It commanded the whole judgment, interest, and costs to be collected, while the endorsements notified him that all interest was paid up to 1st January, 1877. These credits were entered upon the judgment docket in 1876 and appeared endorsed on executions issued thereon. This was the state of the record at the time he states in his deposition that he figured upon the liens and declined to bid, notwithstanding he had promised Stratton he would bid "for that property when it was levied on."

It is incredible that Bass in all these movements involving large interests of his relating to this identical judgment should not have known the entries of credits upon the judgment docket and endorsed on the writs issued thereon. It would have been the grossest negligence to have not known of these credits, and the record shows him to have exercised the greatest diligence.

In his answer (on page 32 printed Record) Bass states that in 1876 "he caused an investigation to be made of the title to the lands embraced in certain mortgages and found, to his surprise, that they were so encumbered by mortgage, judgment, and tax liens that it was doubtful whether they would sell for enough to pay said liens." This Stearns judgment was one of those liens he caused to be examined, and he or his examining agent must have known of these credits if this part of his answer is true. The mortgages executed to Bass and after which he caused said judgment liens to be examined bear date November 4, 1876 (see printed Record, p. 31), but these receipts showing payments on the

Stearns judgment were placed upon the judgment docket October 12, 1876.

These receipts were not only pasted on the docket, but the substance of them copied at large on the same page of the same docket where the judgment was entered, and it was impossible to have examined the amount of the judgment and its date to determine the amount of the lien upon Bass's property without at the same time seeing the credits. (See Karn's deposition, printed Record, pp. 74 and 75.) These facts overwhelm and falsify Bass's statement in his answer that he did not know of these credits when he bought the land in controversy. It is conceded by counsel for appellant (see page 33 of his brief) that Bass did make this investigation of these judgments and determine the amount due thereon after his mortgages were executed, November 4 and 6, 1876. Before that time the record showed the credits and the amount then due upon this Stearns judgment. The appellant for one purpose insists upon a state of facts that cannot be true unless he knew at that time the amount due on Stearns' judgment, less the credits thereon, and yet to escape from the legal and equitable effect of those facts upon the validity of his purchase of the land in controversy he flatly denies them in his answer. This is to play fast and loose and is not creditable in a court of equity.

But, independent of this conclusive showing from his own sworn answer that he did know of these credits before he purchased the land in controversy, we insist that said credits were matters of public record and he was bound to know them. The appellant in his brief stands with determined obstinacy upon the proposition that Milmine was bound to take notice of the appellant's purchase of the Milmine land; that the public records showed the issuing of the writ, the sale, return of the officer, and conveyance by the sheriff; that these public records were notice to Milmine and the world, and that no one could be heard to say he did not know them. This proposition is equally applicable to Bass.

His title rests upon the record in which they are recorded, and he could not trace his record title without seeing them. We therefore insist that the execution under which he purchased was issued to extort collections not due from Bowser to Stearns as to the sum of $711.15, and which was, in fact, known to Bass as well as Stearns, and that Bass was also bound by constructive notice thereof.

These facts bring us to the discussion of the first legal proposition in the case:

Does not the issuing of the execution on the Stearns judgment on the 6th of July, 1878, for $711.15 more than was due thereon render the sale of the Milmine land thereon to Bass, having knowledge of the facts, irregular and void?

It is well settled in Indiana and elsewhere that a sheriff's sale made upon an execution issued upon a satisfied judgment is void.

Splan *vs.* Gillespie, 48 Ind., 412.
The State *ex rel. vs.* Salyers, 19 Ind., 437.
Laval *vs.* Rowley, 17 Ind., 36.

The right to have a *fi. fa.* issued and levied is a statutory right and is conditional upon the existence of a valid judgment, and the sheriff's power to sell is a special statutory power and can only exist when the execution issues upon such a judgment. While the right to issue and the power to sell are thus conditional upon the existence of a judgment, neither the right nor the power are entirely wanting when the sheriff holds a writ for a larger sum than is actually due at the time on the judgment.

It is, therefore, held, we believe, by many of the cases, that a sale made to a *bona fide* purchaser under such defective power will be good. But if the purchaser knew or by reasonable diligence might have known that the judgment was partially paid or that the amount due thereon was less than the writ authorized to be collected his purchase would be fraudulent and voidable if not void.

It will appear, further on in this brief, that when Bass made this purchase of Milmine's property on that judgment he was in equity bound to protect said property against said judgment. There can be no *bona fides* in such a purchase. Bass, at the time the first levy was released and at the time he bought the Milmine property, was the owner of the N. ½ of S. E. quarter of section 27, township 31, range 13; N. ½ S. W. quarter section 27, township 31, range 13; the S. E. quarter of the S. E. quarter, same section; fractional N. W. quarter section 34, same township and range; lot 34, in Bowserville, 60 acres off north side of N. ½ S. W. quarter section 6, township 30, range 15. This property was worth, when it was purchased by Bass at sheriff's sales on judgments dated after the Milmine mortgage, over $22,000.

See deposition of D'Issay, p. 159, and the depositions of Dennenfelser, Young, Gerke, and Kohemey, on p. 161.

The whole amount of the judgments on which he purchased this property was $2,374.91; or, in other words, if he paid the whole amount of said judgments upon which he bid he made a net profit of $19,625.09. This property was purchased at said price because of the $6,000 of judgment liens thereon prior to the dates of the judgments on which he purchased. Such a purchase was equivalent to an assumption to pay these prior judgments, including the one in favor of Stearns; yet on the 3d of August, 1878, instead of paying the Stearns judgment, for the payment of which he had already had value received almost five times over, he procures the sale of the appellee's property on said judgment for $2,000, which was then worth about $25,000; and after he had thus, by means of said prior liens, acquired over $35,000 worth of property for $4,374 he managed to cause said prior judgments to be levied upon and paid by the sale of numerous other pieces of Bowser's property. This sharp

management and the fruits of it comports quite well with the simplicity of his sworn statement, and that he only desired to get the property at its fair valuation or let some one else have it.

All these facts show the character of the purchase. They fix upon Bass knowledge of the credits. They fix upon him a sharp contrivance to make Milmine pay a judgment that Bass knew he had assumed in equity and was equitably bound to pay. They fix upon him a sharp management that enabled him to wreck the Bowser estate and have it transferred to him for a small fraction of its value, and, not satisfied with Bowser's property, he takes in Milmine's also, and we insist that bad faith is fixed upon him in the purchase of the Milmine land and his purchase is void.

There are many authorities that hold a sale void under an execution issued for more than is due upon the judgment.

Knight *vs.* Applegate, 3 T. B. Monroe, 336.
Glidden *vs.* Chase, 35 Maine, 90; 56 Am. Dec., 690.
Coltraine *vs.* McCaine, 3 Devereux Law, 308 (N. C.); 24 Am. Dec., 256.

In the case of Knight *vs.* Applegate (3 T. B. Monroe, 336) the judgment was for $100. The clerk failed to notice the credit and issued the writ for the full amount. In the course of the decision of the court in setting aside the sale it is said (pages 338 and 339):

"In commanding the sheriff to make the plaintiff's demand there is a perfect conformity between the execution and judgment, but in the amount which by the execution the sheriff was directed to make there is an essential departure from the judgment. The departure consists in the execution omitting to notice the $42.25 which was by the judgment directed to form a credit on the $100. * * * To uphold a sale of land made under execution by an officer it is not enough that the execution purports upon its face to be regular and appears to have emanated from competent

authority. There must also be a judgment to which the sale money is to be applied. The reason is obvious. Lands are made subject to sale under writs of *fieri facias* by statutory enactment, and as it is only in satisfaction of judgments that the statute has authorized the sale, there must of course be a judgment to which the proceeds of the sale may be applied to make the sale a valid one. It would, therefore, judging from the facts proved on the trial of the motion, seem to follow that the sale bond cannot be sustained, for the land appears to have been sold and the bond taken for a sum equal to that mentioned in the execution which issued in favor of Knight against the estate of Applegate, and as the judgment in favor of Knight is in fact for less than the execution there is no judgment to which the excess contained in the execution and included in the bond can be applied. * * * Were the proper parties before the court we should be constrained to decide against the validity of the sale and quash the bond."

If this be the law, that a sale upon an execution for $100 when in fact there was but $58 due is invalid and a violation and an abuse of the statutory power authorizing execution sale, why is not the sale in controversy void upon an execution calling for $2,600 when in fact but about $1,700 was due?

The foregoing case of Knight *vs.* Applegate rests upon the same principle as numerous cases in our own supreme court.

In McQuilken *vs.* Doe, 8 Blackford, 581, it is held that if a treasurer sells property upon a duplicate, where part of the tax charged thereon is invalid the sale is void.

The same is held in 8 Blackford, 335.

In Vail *vs.* McKernan, 21 Ind., 422, it is held that a sale of land mortgaged to the Saline fund for more than was due was void.

In Williamson *vs.* Doe, 7 Blackford, 12, it was held that a sale of land by a school commissioner is void unless made strictly in pursuance of the statutes conferring the power to make such sale.

In rendering the opinion Judge Dewey says:

"It is evident the powers of the commissioner above specified are limited, special, naked powers, not coupled with an interest. The law respecting such powers is that they must be strictly pursued to render valid the act of the agent possessing them. The facts on which the right to exercise his powers must exist or his transactions will be without authority and void."

In Brown *vs.* McKay, 16 Ind., 485, a sheriff's sale of land was held void, made on three executions, because the first had been improvidently issued. All three judgments had been rendered before a justice of the peace, and the record first filed was not so certified as to authorize the issue of an execution thereon. The writs on which the sale was made required more money to be levied than was lawfully demandable, and the power, being a *naked* power, could not be exercised beyond the strict legal right. If the sheriff had been directed by one execution to levy more money than was legally demandable the same principle would apply.

In Hutchens *vs.* Doe, 3 Ind., 528, an execution was issued on a judgment for the amount thereof and costs, and the sheriff sold the land to the judgment plaintiff. The judgment as to the costs was afterwards reversed, and in an ejectment suit the sale was held to be void, and the case of McQuilken *vs.* Doe, 8 Black., 581, was cited as the authority "analogous" in principle. The court said:

"The execution plaintiff caused the land to be sold for a greater amount than he had a right to make by virtue of his executions, and as he is not a *bona fide* purchaser without notice he can take nothing by his purchase."

The earlier cases in this State hold, as the above cases do from Maine, Kentucky, and North Carolina, that when a greater sum is demanded by the writ than is due upon the judgment the sale is void, even if made to a *bona fide* purchaser; but we are inclined to concede that the later cases

in this State hold the sale good if the purchaser buy in good faith and without either actual or constructive notice.

Splan *vs.* Gillespie, 48 Ind., p. 413.

On page 413 the court say:

"But, as we have seen, the offer was not to prove the judgment had been paid before the sale. By a very liberal construction we might make out that it was proposed to prove that there had been a small payment upon the judgment before the issuance of the order of sale and the sale thereunder; but this would not have affected the rights of a *bona fide* purchaser, as the doctrine above stated only applies where there has been an entire payment and satisfaction of the judgment."

But we will not further discuss the law of the question that this writ was irregular because it was issued for more than was due upon the judgment, and that a sale under it to one charged with notice is void.

The next question for discussion is whether the sale made to Bass in violation of the appellee's equities is illegal and void.

Counsel for appellant has recited many facts and discussed many questions, but in his facts and in his law has kept as far from the real point in issue as possible. He writes pages upon propositions that are entirely immaterial and unnecessary to controvert. The entire scope of his argument is to show that—

The levy of an execution and sale of property thereon to an innocent disinterested purchaser who purchases in good faith cannot be set aside, although it might be enjoined.

We desire to discuss both the facts and the law upon an entirely different proposition.

We insist it was the joint purpose of both Stearns and Bass to have the Stearns execution levied on the Milmine land. Both Stearns and Bass knew that Milmine's land and Bass' lands were subject to this Stearns judgment, and they

knew that the lands Bass owned were acquired after Milmine had acquired his. They both knew that the first execution had been levied upon the lots 116 and 117, and that in value these lots were worth enough to pay the Stearns judgment over all prior specific liens thereon. They both knew said levy had been abandoned without being in any way legally disposed of. They both knew that Bass had purchased his lands on judgments that were junior to a large amount of prior judgment liens. They both knew that because of these liens Bass had bought his lands at about 20 per cent. of their actual cash value. They both knew that Milmine lived in another State, and hoped he would not discover their movements till their scheme was consummated. The Stearns knew when they levied upon the Milmine land and Bass knew when he bought for $2,000 it was worth about $25,000. Stearns know and Bass knew at the time this levy was made that over $20,000 worth of said lands so purchased by Bass should in equity have been levied on and sold before they had any equitable right to levy on the Milmine land. This is a strong impeachment of the transaction in issue, but we insist that the record clearly supports it. Many of the above charges are admitted in the answer of Bass; others proven without conflict of testimony, and we believe the only one of said charges really denied by Bass is the one that he combined with Stearns in the release of said first levy and in the levy upon the land in controversy. This Bass attempts to deny in his answer and in his deposition.

The witness Stratton swears to it positively. He was acting as the attorney of Stearns. Executions numbered 9160 and 9351 and *vendi.* numbered 9465 were ordered to be issued by Farrar & Farrar, attorneys (printed Record, pp. 77, 79, and 81). But Stratton acted as the attorney in issuing the *vendi.* No. 9764 (see page 83 of Record), and on the very next day he ordered the sheriff to return this *vendi.* and release the levy (p. 83) and issued another execution, No. 9765, and ordered it levied on the Milmine land. (See Record, p. 84.)

This was all done on the 5th, 6th, and 8th days of July, and the sale was advertised at once and made on the 3d of August following. (See pp. 84 and 85.)

Stratton's deposition is found on pages 96, 97, and 98 of Record. He states he had some connection with the collection of this judgment as attorney with Farrar; that he was authorized to look after it by Farrar, and in pursuance of that arrangement he issued an execution or *vendi.* in the case. The record above referred to shows he issued both. He states that Bass agreed to buy lots 116 and 117, called the Homestead, but when offered he failed to bid according to his previous promise; that Bass said to him "that he or we would endeavor to get the Stearns judgment out of the way first, as that waived appraisement, and that we would endeavor afterwards to find some way to make the judgment the witness represented. I think he said further in that connection that he would try and find some property that could be levied on by the Stearns judgment to advantage, and that he would try and induce Mr. Bowser to turn that out instead of the homestead property, and after that the *vendi.* in the Stearns case was released or returned unsatisfied upon Mr. Bass' recommendation, and a new levy was made on Stearns' judgment on said land, which, if I recollect right, was suggested or pointed out by Mr. Bass."

The master found this statement true, and although exceptions to it were filed by appellant the court below declined to disturb the finding.

See exception 5, p. 169.

See Master's Report, p. 167.

The court below (page 171) held that the appellee was "not without remedy, but from the defendant, who obtained an inequitable advantage by means of the sale as made," was entitled to relief. Why is not Mr. Stratton's testimony correct, corroborated as it is by all the attendant facts, notwithstanding the appellant's denial?

The records fix his relation to these writs as he swears to it Bass admits he promised to buy in lots 116 and 117, and failed to do so, as Stratton states.

See Bass' deposition, p. 113.

Bass admits, as Stratton states, that "he suggested" that he would have to bid upon the Milmine property in order to get the Stearns judgment out of the way. We call especial attention to the first, second, and third questions and answers thereto, on page 113. They contain no denial of his agency in procuring the release of the first levy and the making of the second:

"Q. What, if anything, did you say to Stratton about your having procured the levy to be made upon the land finally sold?

"A. I don't think I ever made any statement that I *procured* it.

"Q. Did you ever procure anybody or direct anybody or suggest to anybody that the levy be there made?

"A. I don't remember of suggesting that that particular property should be levied upon. I may have suggested that that or other pieces of property that were levied upon by judgments which were prior to my mortgage; that I would have to bid what I could safely bid upon them in order to get the judgment out of the way."

Such gingerly statements—"half consenting, half denying"—is a corroboration rather than a denial of Stratton's testimony. Will counsel for appellant contend that Farrar & Stratton were "feeble-minded" and too dumb to realize the situation? Farrar swears that he knew all about the condition of Bowser's property, and that the deputy sheriff also knew. Farrar & Stratton both knew that Bass had purchased the bulk of Bowser's property and was anxious to protect his title by the payment of the prior liens on it, including the Stearns judgment, out of other property. These attorneys and Bass all knew of the equities, and when Bass told them that if their judgment were levied on the

Milmine land he would have to buy, they would have been silly indeed not to know that it all amounted to a statement that if they would levy he would bid the amount of their judgment.

But if they were all so innocent as appellant's counsel suggests—if there was no understanding or joint purpose—how does it happen that their action was so joint and continuous to the end desired? Why did not Stearns levy upon Bass' land, or why did they not levy on the ten thousand or fifteen thousand dollars' worth of land yet held by Bowser? The only explanation is that such a course would not contribute to the interest or scheme of Mr. Bass. If Mr. Bass had nothing to do with these proceedings how did it happen? If the absence of Milmine from the State had nothing to do with them—if some fraudulent scheme was not identified with it, how did the proceedings happen to move with such promptness?

Stratton issued the *vendi.* to sell the lots on the 5th of July. He talked with Bass and ordered it released and returned and a *fi. fa.* issued on the 6th. On the 8th it was levied and on the 3d of August the property was sold to Bass.

The business drove on just as rapidly as the law would allow. Milmine during all the time was in another State and without any notice whatever of the attack upon his interests or the fraudulent purposes of the parties engaged in wrecking his estate; but counsel for appellant, with some vehemence, demands to know what the public records are for if it is not to give notice of these proceedings. We concede these records are valuable and sometimes are notice of their contents; but because they are generally useful are they to be made also a shield to protect fraud? Was Milmine, who probably knew that the Stearns judgment was properly levied on enough or nearly enough property to pay it, bound to take notice that such levy would be fraudulently released and his property fraudulently levied on to pay the judgment? Was he bound to know that Stearns and Bass and

the clerk and sheriff would all combine to violate the law and wrongfully deprive him of his title? Such a claim by one of the parties now holding the swag is in bad taste in a court of equity and ought to fail him.

But the character of this scheme and the extent of the wrong done Milmine is more clearly seen in the light of some additional facts established by the record. Bass was the endorser of J. C. Bowser & Co. at the date of their bankruptcy. He was liable as such endorser for about $20,000. To indemnify himself against loss from these endorsements, on the 4th of November, 1876, he procured from Prentiss & Falls a mortgage on all their interest in the firm property and on the 6th of the same month he procured a mortgage from J. C. Bowser upon all his property. All this property covered by both mortgages was subject to divers judgment, mortgage, and tax liens, a schedule of which constitutes part of Bass' answer.

See Record, pp. 32 and 33.

The judgment liens upon Bowser's property prior to the 12th of May, 1873, the date of the Stearns judgment, amounted to ----------	$3,934 39
The judgment liens prior to June 1st, 1875, the date of the Milmine mortgage, amounted to--	6,181 22
The whole amount of judgment liens prior to the date of said mortgages to Bass was ------	14,647 02
The whole amount of all judgment, tax, and mortgage liens on said property prior to the date of said mortgages was ------ ----------	43,092 91

This last sum includes the mortgage liens upon what is called the foundry property, being the first five mortgages set forth in the stipulation (p. 142), amounting in all to the sum of $25,800.

But these foundry lots were worth at the time	$60,000 00
The 334 acres (see page *supra*) were worth	21,700 00
Sixty acres, sec. 6, town. 30, range 15	600 00
Lots in Bowserville	5,500 00
Lots in Maples and lands adjoining	12,750 00
80 acres in sec. 30, town. 31, range 15	800 00
40 acres in sec. 34, town. 29, range 15	400 00
¾ of 80 acres, sec. 5, town. 29, range 14	450 00
¼ of 80 acres, sec. 5, town. 29, range 14	285 00
Milmine lands	25,000 00
Total	$127,485 00
The whole of the debts, including those upon which Bass was liable as endorser, and all tax liens, amounted to the sum of	65,264 52
Difference	$62,220 48

Or, in other words, the property was worth in cash at least $62,000 over and above all possible liens thereon, including the debts upon which Bass was endorser, and the record shows that portions of these claims were purchased in by him at large discounts, while in many instances portions of judgments upon which he purchased property at nominal prices compared to its real value were left unpaid.

The situation presented a rich field for speculation, and Mr. Bass managed it with a sagacity worthy of a better cause. His first step was to bid in the 334 acres in sections 27 and 34 for $4,442.31, or one-fifth their cash value.

The sales were made subject to all the older judgment and tax liens, including the Stearns judgment. He then purchased the Milmine land on the Stearns execution for less than 10 per cent. of its cash value, said sale being made subject to all the judgments rendered prior to May 12 1873, and then he procured the execution on said older

judgments to be levied on the property at Maples, worth $12,750.00, and bid it all in for $1,835.00. He bid in the foundry property on a foreclosure of the latest mortgage lien, and it cost him the amount of all said liens, $25,800.

It thus appears that the property he purchased was fairly worth over $122,000, and his whole outlay, including the debts he was endorser on, was only $55,000, or a net profit arose from the management of $67,000. To accomplish this he wrecked the Bowser estate, defeated the collection of large portions of the creditors' claims, and appropriated $25,000 worth of Milmine's property.

Upon these facts the question is whether his purchase of the Milmine property was honestly made and his title good.

Milmine's equity was prior to Bass'. Milmine had the equitable right to have Bass' land sold to pay Stearns. Bass had no equitable right to have Milmine's land sold instead of his own to pay said judgment. Neither counsel nor the master nor the court below questions this proposition; but the sale is made and Bass has purchased in violation of these equities and he laughs at the sharpness of his management and at Milmine for not being sharp enough to discover it till he says it was too late. He says the race is to the swift, but a court of equity is likely to meet the fraudulent runner at the end of his race and call him to account.

We have abstracted these facts from the record more at large because the appellant has excluded them from his argument and discussed matters foreign to the real issue.

Could Stearns legally make this levy and could Bass legally buy this property, each knowing all the facts? Could Bass, when his own property was in equity first liable to this judgment, buy Milmine's to relieve himself from the judgment which he, as between himself and Milmine, was equitably and honestly bound to pay?

This identical question came up in Clowes *vs.* Dickinson,

5 John Ch., 235, except that in that case the party entitled to such equitable protection was present at the sheriff's sale and delayed four years thereafter before he filed his bill for relief; and yet it was held that the purchaser should not retain the benefit of his purchase, and he was required to account for the value thereof to the plaintiff therein, and on appeal the court of errors held that for the purpose of such accounting the amount the land sold for at sheriff's sale was not the measure of value, but such purchaser should account for the actual value.

The defendants in that case had become the purchasers of the property out of which the common lien ought to have been paid, and they purchased the judgment and caused it to be levied upon the plaintiff's land, which in equity ought not to have borne the burden, and bought it in. The chancellor said:

"But the purchasers under that sale have since acquired the ownership of Kimberly's judgment and wielded it with a very inequitable hand. They have, by execution under it, sold the lots of the plaintiff and purchased them in for their own common benefit. As owners of Kimberly's judgment they have sold the lots of the plaintiff in part satisfaction of it, whereas it ought in justice and equity to have been entirely and exclusively satisfied out of the residue of the property of which the defendants were themselves the subsequent purchasers. The only question, then, in the case is as to the proper relief or indemnity to be afforded to the plaintiff. I do not think it would be expedient to direct a reconveyance of the lots."

The sale was made in 1813, and the plaintiff waited four years before he filed his bill, and the defendants had made extensive improvements on the lots.

We also cite Wise *vs.* Shepherd, 13 Ill., 41, as in point. The equities in that case were similar to the case at bar, and the sale had also been made before the bill was filed, yet the court did not hesitate to set aside the sale and establish the equities of the parties.

Ross recovered separate judgments for the same debt against Shaw and Price, in which debt Price was surety. Price thereafter executed a mortgage to Gibson, and thereafter Wise recovered judgment against Shaw. Wise purchased the Ross judgments and levied the same on the land Price mortgaged to Gibson and sold Shaw's land over on his own judgment. Shepherd purchased under the Gibson mortgage and filed his bill to cancel the Ross judgment and have it decreed satisfied, and to quiet his title derived through the Gibson mortgage. He averred the above facts, and also that the sale of the Shaw property on the Wise execution produced enough to satisfy the Ross judgment if it had been applied. The Price property had been sold on the Ross judgment and bought in by Wise before the bill was filed.

In this case, like the case from 5 John. Ch., 235, the plaintiff stood by without objection and with full knowledge until after the sheriff's sale of the property in which he was interested, and thus permitting Wise to add the legal title to all his equities; but when it was determined that Shepherd's equities under the Gibson mortgage were superior to the equities of Wise, of course the legal title acquired by Wise had to yield.

Judge Trumbull:

"The question, then, is, Who has the superior equity to subject the property mortgaged by Price to the payment of his debt—the mortgagee or Wise? for if the sale made under the execution issued upon the Ross judgment is permitted to stand it is in effect permitting Wise to obtain satisfaction of the judgment against Shaw out of Price, at least to the extent of the value of the property of Price taken in satisfaction of the Ross judgment. It is clear that Wise possessed no other or greater rights over the property of Price than did Ross, from whom he purchased the judgment. As between Ross, Shaw, and Price, Shaw was bound in equity to pay the debt to Ross. Price was the mere security for Shaw, and ought not in justice to have his property

subjected to the payment of his principal's debt while the principal has property of his own subject to the same debt amply sufficient to discharge it."

This statement is precisely applicable to the case at bar. Milmine, the plaintiff, and his interest in the property in controversy were the sureties of Bowser to the extent of the value of the property for the payment of said judgment debt to Stearns *et al.* Bowser had a large amount of property besides bound for this debt, which was purchased by Bass long after the Milmine mortgage was executed. Bass, to protect his interest, manages, just as Wise did, to have the surety's property sold to pay his principal's debt to enable him to hold the property he purchased, that ought to have been sold to pay said debt. The cases are exactly similar in in facts, principle, and management.

Lord Eldon in *Ex parte Kendall*, 17 Ves., 520, says:

"We have gone this length: If A has a right to go upon two funds and B upon one, having both the same debtor, A shall take payment from that fund to which he can resort exclusively that by those means of distribution both may be paid. That course takes place where both are creditors of the same person and have demands against funds the property of the same person."

Dorr *vs.* Shaw, 4 John. Ch., 17.

The power of the chancellor to preserve and enforce the equities of the plaintiff as well after the sale of the premises in controversy as before is fully established in

James *vs.* Hubbard, 1 Paige, 228.

In that case Hubbard had a judgment which was a lien on Tuckerman's land, who, after the judgment lien attached, sold the premises in parcels to divers persons. The first piece sold came to James; but on the sale under the execution the Berry farm was not sold, but the plaintiff's land was sold in its stead, to make the money due on

the judgment, and was bought in by Hubbard. All the parties holding the various parts of the Tuckerman land were not before the court, and the chancellor could not enforce all the equities against all the said successive purchasers; but the owners of the Berry farm were before the court, and it was decreed that their farm should be sold and the money be applied "in satisfaction of the amount for "which the complainant's lands were sold, and if there is "anything remaining after satisfaction of that amount that "it be applied in payment of the complainant's costs in this "suit. * * * It is stated in the proofs, although I have "not been able to find any allegation of the fact in the bill "or admission in the answer, that the reason why the Rey-"nolds lot was not sold was that there had been some agree-"ment with Hubbard by which that lot was discharged from "the lien of the judgment. If such was the case, the com-"plainant had the right to have the value of the lot deducted "from the amount of the judgment before his lot was sold. "If, therefore, the Berry lot shall prove insufficient to satisfy "the amount charged on the complainant's farm, with costs "as above mentioned, it must be referred to a master to ex-"amine and report whether Hubbard had done any act by "which the lien of his judgment on the Reynolds lot had "been legally or equitably discharged previous to the sher-"iff's sale, and if it had been so discharged the master is fur-"ther to report the value of that lot at the time of the sher-"iff's sale, allowing the owner to retain possession thereof "until the expiration of the time of redemption on sheriff's "sale, and that on the coming in and confirmation of such "report the value so reported, with the interest thereof, or "so much as may be necessary to satisfy the balance due the "complainants as aforesaid, be paid him by the defendant "Hubbard or allowed towards the redemption of the com-"plainant's land from the sheriff's sale."

The management of Berry, in protecting his lands from sale to pay the judgment when equity required them to be

first sold, was not effectual, and Hubbard's release of Arnold's lot was held to reduce his judgment to the amount of its value, and the application of amount to be derived from the sale of the Berry farm and the value of the Arnold lot were to be applied in releasing the plaintiff's land from the sheriff's sale, and if sufficient the sale, of course, was annulled.

In Grosveneur *vs.* Lynch, 2 Paige, 300, it is held that possession is notice for such purposes as well as the record of the deed for the premises.

In Guion *vs.* Knapp, 6 Paige, 35, it is held that the record of deeds of purchases from a mortgagor is sufficient notice to the mortgagee to release the land purchased from the mortgage if the mortgagee shall release lands of sufficient value afterwards conveyed by the mortgagor.

In opposition to these authorities counsel for appellant cites the case of Sansberry *vs.* Lord, 82 Ind., 521, and makes a long quotation from the opinion, but is careful to omit the material point of the opinion applicable to this case, which is:

"Again, it is not averred that the deed to Ann C. Allen had been recorded or that Sansberry had any notice that Flemming had sold the land, and as he purchased for value and without notice for aught that is averred, he must be regarded as a *bona fide* purchaser, and the deed of conveyance made by Flemming to Ann C. Allen must, as against Sansberry, be regarded as fraudulent and void. The deed being regarded as fraudulent and void, it follows that the appellees who claim through it cannot question the legality of the sale. It is said, however, that as Sansberry was the execution creditor he is charged with notice of all irregularities in the sale. This is true, but he is not charged with notice of an unrecorded deed."

This omitted statement gives the true ground of the decision. The creditor was the purchaser, and he had no knowledge of the equities he was charged with violating. The case simply decides that where neither the execution

creditor nor the purchaser has no notice of the equities the sale is good. This might well be conceded.

The cases of Terry *vs.* Woods, Wiggins *vs.* Suffolk, James *vs.* Hubbard, cited by counsel, go no further.

We concede that they establish the rule and the rule is good law that these equities will not defeat a sale when the purchaser at sheriff's sale was not notified or had neither sought nor obtained any advantages by disregarding such equities. They are therefore not in conflict with the authorities above cited by us.

The appellant also cites the case of Richey *vs.* Merritt, 108 Ind., 347.

It appears from the finding of facts that one Bristow owned about thirty pieces of property and suffered judgment in favor of one Barnes, which was a lien upon all. Afterwards Bristow sold part of the property to Merritt, and then divers pieces to other parties, and some of them to Richey. Execution issued and was levied on the land sold to Richey and some others. Richey purchased the judgment, and without disposing of this levy had the property first sold to Merritt and others; property subsequently sold levied on and sold the same, Merritt purchasing some at this sheriff's sale and Richey purchasing some. Both purchases were made in violation of the equities of the original purchases.

The appellant's counsel again shrewdly excludes from his quotation the parts of the sentence that show exactly what the court decided.

We add the following additional portions of said opinion, this part preceding that set out by appellant's counsel:

"An execution plaintiff is charged with notice of all irregularities which may have occurred, both in the issuance of an execution and in the sale of property upon it. Hence when an execution plaintiff becomes the purchaser the sale will be set aside for irregularities which could not be made effective against innocent third parties not so chargeable with notice of mere irregularities. In this case Richey, being the assignee of the judgment, stands in the

relation of execution plaintiff to the execution which was issued after he became such assignee, and is to the same extent chargeable with notice. On the other hand, the execution defendant, by his acquiescence in irregularities in the proceedings upon an execution, including the sale of property thereon, may estop himself from obtaining an order setting aside such sale."

And the following, succeeding that included in appellant's brief:

"By a recurrence to the opinion pronounced in this case at the former appeal it will be seen that there was an averment in the complaint making an excuse for the plaintiff's delay in objecting to the sale of his property, but that averment was not sustained by the facts found at the trial, and hence as to that averment it must be inferred that the evidence was not sufficient to support it. The plaintiff, therefore, in a very material respect, failed to make out the case presented by his complaint."

From the whole opinion it appears that Merritt consented to the issue and levy of the second execution and purchased part of the property levied on. Of course he was estopped to file a bill to set aside such a writ. His purchase under the writ that was levied on his property and upon which his property was advertised to be sold, without any effort to enjoin the sale, was properly held to be a waiver of his equities.

But the above portions of the opinion, omitted in the appellant's brief, show that but for this knowledge and these waivers Merritt would have been entitled to have the sale of his property set aside. Said case had been in our supreme court before, and was reported in 97 Ind., 236.

The case went up on a demurrer to the complaint, which alleged that Richey had promised Merritt that he would bid off the lands sold after his purchase, and then bought Merritt's land, in violation of such promise. This excuse was held to be good and the bill was sustained.

The following parts of the opinion establish two propositions that are fatal to Bass's title—first, that it was his duty to pay the Stearns judgment, and, second, that the first levy of the Stearns judgment relieved Milmine from the duty of obtaining an order requiring the property of Bowser sold by the sheriff in the inverse order of the transfers by Bowser or by the sheriff for him:

"This being the rule in equity, it follows as a sequence that as between the first and any subsequent purchaser it becomes the duty of the latter to pay the judgment by allowing the land purchased by him to be first applied to its payment; and when such subsequent purchaser, upon whose land the writ issued upon the judgment has been levied, either pays the judgment or takes an assignment of the same to protect his land, such judgment must thereafter, as against a prior purchaser, be deemed extinguished if the land levied on was of sufficient value to pay it.

"The judgment being extinguished by its actual payment or by its assignment to one upon whose land it had been levied and whose duty it was to pay it, no valid sale could thereafter be made to him of the first purchaser's property upon a writ issued upon such judgment."

Harman *vs.* State, 82 Ind., 197.

"Such levy relieved the prior purchaser from the duty of obtaining an order requiring the propery to be sold in the inverse order of its alienation, and such purchase and assignment of the judgment were tantamount to a satisfaction of the same by the application of such property as against a prior purchaser."

We rest upon the principle here declared. It is consonant with justice. It is in line with equitable principles. It is identical with the doctrine laid down by the cases cited above from New York and England. It does Bass no harm. It takes from him nothing he was entitled to have. It does justice to Milmine by restoring his property taken from him without consideration, and we hope for this relief.

One of the principal reasons for asking that the sale of

our land, worth from $20,000 to $30,000, to the appellant on a bid of $2,000 be set aside arises from these facts: J. C. Bowser owned lots 116 and 117, in the original plat of Fort Wayne. The master has found that they were then worth not less than $10,000, perhaps $11,000.

It was agreed, for the purposes of this case, page 152 of Record, that this property was encumbered by a mortgage executed by Bowser and wife and by taxes to the amount of $8,008.63; that the execution on the Stearns judgment, on which was $1,698.63 equitably due, was levied first on these lots, and that after several offers to sell abandoned by the sheriff and levied on our land, which was then sold, and unless such sale gives the appellant title he has none. We claim such change of levy was done through Bass' manipulation; they deny it, although they do not deny that he had knowledge of all that was done by the sheriff. The question thus presented is—

Did not the levy of the execution on the Stearns judgment upon lots 116 and 117 render void the subsequent levy of the execution issued on the same judgment upon the land in controversy?

We insist that after the Stearns judgment was levied upon lots 116 and 117 its general lien became suspended, and that no *alias* execution could issue or other property be levied on till such first levy was disposed of.

In another place in this brief we have cited authorities that conclusively decide that a sale upon a satisfied judgment is void.

Among the first cases decided by the supreme court of Indiana, November term, 1823, was Lasselle *vs.* Moore, 1 Blackford, 226. It was then held that a levy of an execution upon lands or goods of a sufficient value to pay the judgment on which it issued raised a presumption of satisfaction. This was followed in the cases of McIntosh *vs.* Clew, 1 Blackford, 289; Stewart *vs.* Nunnemaker, 2 Ind., 47; Doe *vs.* Dutton, 2 Ind., 309; Law *vs.* Smith, 4 Ind., 56;

Barrett *vs.* Thompson, 5 Ind., 457. After these decisions had been made the question was generally thought to be settled. It was, however, raised again in 1873, in the case of Lindley *vs.* Kelley, 42 Ind., 294.

In this case Judge Buskirk reviews all the decisions theretofore made in Indiana and states the law at that time to be as follows:

"It is well settled by repeated decisions of this court that a levy upon lands and goods of sufficient value to pay the judgment upon which the execution issued raises the presumption that the judgment is satisfied, and another levy by virtue of the same writ cannot be made until the property first levied on has been legally disposed of and *its insufficiency shown by an actual sale.*"

In this case the Supreme Court notice the case of United States *vs.* Dashiel, 3 Wal., 668, and after quoting from Judge Clifford's opinion the same statements quoted and relied upon by the appellant's counsel, say:

"It will be observed that in the above opinion a distinction is drawn between the effect of a levy upon personal property and real estate.

"The same distinction is recognized in most of the States of the Union, as is shown by the authorities hereafter referred to, but in this State no such distinction has been made.

"The rule has existed in this State from the organization of the State that a levy upon real estate of sufficient value to pay the judgment creates a presumption of satisfaction, and while it is to be desired that the decisions of this court should be in accord with the decisions of the Federal and other State courts, we do not feel called upon to change a rule that has existed from the organization of this court down to the present time. It has become a rule of property and the doctrine of *stare decisis* applies with great force."

Counsel for appellant seem to think that because this court can make a different rule of law applicable to property in Indiana from that laid down by Indiana courts that it will do so.

We are constrained, however, to believe that the well-known conservative decisions of this court will not now be changed.

The next case decided by the supreme court of Indiana in point in this discussion is Frank *vs.* Brasket, 44 Ind., 92. In this case the appellant holding a judgment that was a first lien on a piece of property the appellee, became replevin bail. The appellant carelessly allowed his lien to be set aside and made second to a mortgage lien. The court held that the replevin bail was released, because the appellant, having once acquired property, was bound to assert and maintain his right to it, and if he lost it he should lose his right to payment, and reaffirm their former decisions by this statement (see page 96):

"It is settled that a levy upon property, real or personal, sufficient to pay the execution operates as a satisfaction until such levy is legally disposed of by the sale of the property or in some other legal manner."

The next case in point of time is that of McCabe *vs.* Goodwine, 65 Ind., 288. The circuit court found, among other facts, that McCabe obtained a judgment against Bowlus and levied an execution on sufficient property to pay it. Bowlus was then forced into bankruptcy.

The assignee took possession of the property and sold it to Goodwine subject to all leins, which he gave a bond to pay. The circuit court then found, as a matter of law, that the lein of the levy continued after the property came to the assignee; that the levy was a satisfaction *prima facie*, and the sheriff had a right to and must follow it to sale.

The supreme court (see pages 296 to 302), in an opinion written by Judge Worden, one of our ablest jurists, while noticing counsel's main reliance (United States *vs.* Dashiel, and several other cases), holds that the levy was a satisfaction of the debt; *that it operated as a payment*, and that the

general judgment lien was, because of such levy and until the property covered by it had been sold, extinguished.

The next case in point of time that decides this question is Neff *vs.* Hagaman, 78 Ind., 57.

A statement of the facts in this case will show that it is applicable not only to this question, but also as to the equitable rights of the parties elsewhere presented in this brief.

Neff recovered a judgment against Peter, Nancy, and James Hagaman October 25, 1876, for $410. Execution was levied April 30, 1877, on land belonging to Peter, who was the principal debtor on the Neff debt, although the judgment did not disclose that fact. The land was worth $3,500. It was encumbered by a judgment in favor of McKinney against said Peter Hagaman and others, rendered on June 14, 1876, and also a judgment prior to that in favor of Fuller. The sheriff levied the McKinney execution the same day he did the Neff execution. The property remaining unsold, he returned the McKinney execution showing the levy, and a new writ was issued showing such former levy. He then advertised and sold the property August 18, 1877, to McKinney for $342. This was applied on the Fuller judgment. October 2, 1877, the sheriff levied on the land of James Hagaman with the same execution in favor of Neff that he had before that, April 30, levied on the land of Peter.

This execution was returned October 24, 1877, showing both levies.

October 25th, 1877, a new execution was issued reciting the levy on the land of James, but omitting that on Peter's land. The sheriff sold James Hagaman's land and, there being no redemption, a deed was issued and suit was brought to obtain possession of the land.

The court held the sale void.

In the opinion it is said: "The law has been settled in this State for nearly sixty years that a levy upon land or goods of sufficient value to pay the judgment upon which the exe-

cution issued raises the presumption that the judgment is satisfied, and another levy and sale cannot be made until the first levy has been legally disposed of."

It is also said that as in Indiana a judgment is a lien on real estate a sale upon a junior lien will not divest a senior lien, and that because of that the sale to McKinney did not divest the lien of the Neff judgment. This was also true because under our statute the title of an execution debtor does not pass till one year after the sale, and McKinney's title would not accrue to him till August, 1878, while the sale to Neff was in November, 1877. The court then say:

"The sheriff had no authority, of his own volition, to abandon the levy upon the lands of Peter Hagaman."

This follows from the decisions of this court, above cited, that a sufficient levy is *prima facie* a satisfaction. It was said in McCabe *vs.* Goodwine that "where property has been released from a levy by consent of parties to the execution the plaintiff cannot abandon such levy to the injury of third persons. The alleged abandonment of the levy on the lands of Peter Hagaman was unauthorized by law."

Citing Freeman on Executions, sec. 271.

As preliminary to the next decision of our court on this question, McIver *vs.* Ballard, 96 Ind., 76, we wish to call attention to the statutes of Indiana in force since 1852 and similar to preceding statutes, the language of which undoubtedly had not a little to do with making the decisions as they are.

The sections applicable are to be found in 2 Gavin and Hord, sections 405, 411, 433, 453, and 454.

SEC. 405. "Writs of execution as now used for the enforcement of judgments are modified in conformity to this chapter." * * *

SEC. 411. "The execution must issue in the name of the State and be directed to the sheriff of the county, sealed with the seal and attested by the clerk of the court. It must in-

telligibly refer to the judgment, stating to the court where and time when rendered, the names of the parties, the amount, if it be for money, and the amount *actually* due, and shall require the sheriff substantially as follows:

"First. If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment out of the property of the debtor subject to execution."

SEC. 433. "When an execution against the property of any person is issued to the sheriff he shall proceed without delay to levy the same upon the property, rights, credits, and effects of the defendant."

SEC. 453. "When any property levied on remains unsold, it shall be the duty of the sheriff, when he returns the execution, to return the appraisement therewith, stating in his return the failure to sell and the cause of the failure."

SEC. 454. "The lien of the levy upon the property shall continue, and the clerk, unless otherwise directed by the plaintiff, shall forthwith issue another execution, reciting the return of the former execution, the levy, and the failure to sell, and directing the sheriff to satisfy the judgment out of the property unsold, if the same is sufficient; if not, *then* out of any property of the debtor subject to execution."

The court, in the case we have just referred to, McIver *vs.* Ballard, set aside the execution because the statute had not been followed, and say "there is no equity in the suggestion that a party who has issued an irregular execution, liable to be set aside on complaint or on motion, should in a valid proceeding to set it aside be placed in the same position as if he had exercised his statutory rights." This was done both because of the former decisions that a levy on property of sufficient value to pay a judgment is to be deemed a satisfaction of it, and because of the statute requiring that when a levy is made on a piece of property it must be sold and not abandoned.

Counsel for appellant urge that these decisions should not be followed by this court, as they do not establish a rule of property. We think that they not only do that, but that they go farther and have become a part of the statute itself—

incorporated into it by their very interpretation, as has been often said.

Numerous cases of this court have been decided holding that where a statute of a State has been construed by the supreme court of the State that this court will adopt and follow it.

Among others, are Southern Pac. R. R. Co. *vs.* Orton, 6 Sawyer, 157; Hall *vs.* De Cuir, 95 U. S., 485; Claiborne Co. *vs.* Brooks, 111 U. S., 400.

The supreme court of Indiana has referred to this question as the settled law of the State in the cases of Merritt *vs.* Richey, 97 Ind., 236, and Richey *vs.* Merritt, 108 Ind., 347, on page 352.

The following authorities from other courts show that our position is well taken:

Hoyt *vs.* Hudson, 12 Johnson, 206, is in point as to the power to make a second levy before the first is disposed of. The officer levied on a sleigh and placed it in the hands of one Hudson, taking his receipt containing an agreement of Hudson to return the sleigh or pay the debt. The officer levied on a horse and it was held, *per curiam*, "that when an officer, under an execution, has once levied upon the property of the defendant sufficient to satisfy the execution he cannot make a second levy. This principle is well settled." Such levy is void.

In The People *vs.* Hopson, 1 Denio, 578, the defendant was indicted for an assault upon a constable. He had levied on a mare of sufficient value to satisfy the execution, and by carelessness lamed her until she sold for $1.87, and went on defendant's place to sell other property. The court held that "so long as the property remains in legal custody the other remedies of the creditor will be suspended. *He cannot have a new execution* against the person or property of the debtor nor maintain an action on the judgment nor use it for the purpose of becoming a redeeming creditor."

In Green *vs.* Burke, 23 Wend., 490, an execution was is-

sued by a justice and delivered to a constable who was a minor, who, by the judgment defendant's consent, levied it on three colts. The constable afterwards abandoned the levy on account of his minority and notified the defendant of the facts, who still held possession of the property. The justice issued another execution, which was levied on nine acres of growing wheat. The wheat was sold, yet the defendant persisted in harvesting it, and the plaintiff replevied.

"The goods levied on are a pledge for the debt, like a distress for rent in the hands of the landlord. That, too, works a suspension of all other remedy." (23 Wend., 499.)

After a review of all the leading cases Cowan, J., in Green *vs.* Burke, on page 501, 23 Wend., says:

"What, then, does the rule amount to? Merely this, that the levy is a satisfaction *sub modo*. It may operate as a satisfaction and must be fairly tried, but if it fail in whole or in part without any fault of the plaintiff *he may go to his further execution*. He must fairly exhaust the first, and while that is going on he can neither sue on the judgment nor have another *fi. fa.* nor *ca. sa.*, nor can he redeem lands sold on another judgment."

The appellant seeks to avoid our position as to the character of this sale by claiming that there was not sufficient value in the property to pay, by his computation, over $431.47 of the Stearns judgment; that his ideas of values are to govern and decide what the sheriff should have done.

He says that the property was not worth over $10,500. The best of our witnesses, if we may be allowed to go as far on the one side of the record as he does on the other, put the highest value on it, $12,000 to $16,000, and the experience of those men has been amply justified by time, as it is now worth from $20,000 to $25,000.

The prior liens, taxes, and mortgages were not subject to that uncertain quantity, viz., Mrs. Bowser's dower. Whatever way we look at it, the more certain we become that

equity as well as law required a sale on the Stearns judgment and execution before it was abandoned. That would not leave to conjecture and the opinion of counsel what the rights of parties were.

The last point we ask to be considered is the effect the extension of time of the Stearns judgment is to have upon its lien on the land in controversy. It is conceded that Stearns *et al.* did extend the time of payment from time to time in consideration of Gardner, Blish & Co., the principal debtors, paying the interest at 10 per cent. in advance, the last extension of time being from July 26, 1876, to January 1, 1877.

The defendants seek to avoid what would otherwise be a fatal objection to any farther proceedings upon their judgment by answering that, while they admit the suretyship of J. C. Bowser, J. R. Prentiss, and D. F lls, as they were a firm, doing business under the firm name of J. C. Bowser & Co., agreeing to any extensions that Stearns *et al.* might see fit to make, that therefore the extension makes no difference. We think that even this creates a partial, if not a total, satisfaction of this debt, so far as we are concerned. The strongest construction of the consent as against us is that it was signed by Mr. Bowser himself. If it had been signed by any of the other members of the firm Bowser would have been released, and through him the property in controversy would also have been released. We submit that neither one of these partners had power in such a case as this to bind the other partners and continue their liability. It was not a firm debt to which either member could make contracts and bind the others. It was a debt of Gardner, Blish & Co., on which J. C. Bowser & Co. were sureties.

There is no evidence beyond the mere paper itself, and applying to this the rule laid down by Lord Ellenborough in Duncan *vs.* Lowndes, 3 Camp., 478, that "if a guaranty is signed by only one of two partners in respect to a matter in which it appears that the partnership had no concern, in

order to support an action on such guaranty it was necessary to give some evidence beyond the relationship of partners subsisting between them to bind the other by such an instrument."

If, therefore, we should admit that Mr. Bowser did sign the paper giving the time it would release Messrs. Prentiss and Falls. To release Prentiss and Falls would in effect release Mr. Bowser of two-thirds of the debt. See Brandt on Suretyship, sec. 383, p. 517, where, quoting from Rice *vs.* Morton, 19 Mo., 263, he says:

"Where a creditor by his acts discharges one surety he can only hold the other surety liable for his *pro rata* share of the debt."

And again on the same page, citing Stirling *vs.* Forrester, 3 Bligh, 575:

"Time was given to three sureties, and it was held that the remaining surety was released from three-fourths of the note for which he had become bound."

And again, citing Hodgson *vs.* Hodgson, 704:

"B and C were jointly liable as sureties of A. D, the wife of A, charged her separate estate to indemnify B against loss. B paid the debt and released C; held that D was released from one-half the loss suffered by B."

There would, then, be but little over $500 of this judgment that could in any event, under the evidence, be collected of Mr. Bowser or out of his property.

All these facts are set forth on the judgment docket, of which Mr. Bass was bound to take notice, even if he did not have actual notice, as we think the evidence shows he had.

We then have a sale of property on a writ calling for over $2,200 upon a bid for $2,000, when, in fact, only $518 was due or collectible as against Bowser in any event

We leave this point without further citations or argument than is elsewhere stated herein.

Before we leave this point as to the effect of the extension of time we wish to insist that by so doing Milmine's property was wholly released.

We claim, first, that the property mortgaged to Milmine stood in the same relation as a surety of Gardner, Blish & Co., and also as to Bowser, Prentiss & Falls, who are as to him principal debtors, and that if Stearns *et al.* dealt in any way with Gardner, Blish & Co. or Bowser or Prentiss or Falls that would have released a surety, it released Milmine's property. That it stands as a surety (see Brandt on Suretyship, sec. 21, p. 27), where, on the authority of cases from Iowa, Michigan, Illinois, New Jersey, Connecticut, Mississippi, Georgia, and several English cases, he lays down the rule that—

"When property of any kind is mortgaged or pledged by the owner to answer for the debt * * * of another person, such property occupies the position of a surety or guarantor, and anything which would discharge an individual surety who was personally liable will, under similar circumstances, discharge such property. This rule is applicable to every variety of circumstances."

And again:

"C gives B a mortgage on a piece of his property to secure a note held by B against him. A also gives B a mortgage on some of his property to secure the same debt. Held, that by this transaction A's property became the surety of C, and was discharged by giving of time to C."

White *vs.* Ault, 19 Ga., 551.

And again (p. 28), when such property becomes released at law, equity will not again charge it, citing 21 Wis., 392.

And again, on same page, citing 68 Pa. St., 294, where one owning two tracts of land sells one, the one sold becomes surety for the other, and if the one remaining be released, the one sold is discharged.

And again, citing 65 N. Y., 397, where time was given upon other security after one had purchased a tract of land on which was a judgment lien, it released the land because it had occupied after the purchase the position of a surety, and by the taking of other security, giving time, it destroyed the surety's right of subrogation, and the lien was discharged.

We think, from the rules laid down in the foregoing authorities, that without regard to any other questions, that while Stearns *et al.* held the levy of their execution on lots 116 and 117 those lots were to be regarded as between them and the property in question as standing in the position of principal and Milmine's property as surety. They had a valid lien on them and they knew of his lien on the property in question. He was entitled to be subrogated to their judgment, which, as we understand it, is the test of suretyship. Messrs. Stearns *et al.* stood as a trustee for all parties concerned, and when they relinquished those lots they were bound to release all others holding subordinate liens to an amount equal to the value of the property relinquished.

Brandt on Suretyship, section 378, p. 509, with good reason and upon the authority of many cases, says:

"If a creditor recovers a judgment against the principal and surety, or against the principal alone, and levied upon real or personal property of the principal subject thereto, and such property is by the act of the creditor released from the levy and lost as a security, the surety is discharged to the extent that he is injured thereby. This is the most frequently occurring illustration of the rule that the surety is entitled to the benefit of all the securities which the creditor, after the surety becomes bound or at any time, may obtain for the payment of his debt. The creditor is not bound to be diligent in obtaining securities for the debt, *but having obtained them, he at once becomes a trustee thereof for all parties concerned.*

"In a leading case on this subject, Mayhew *vs.* Crickett, 2 Swanton, 185, per Lord Eldon, C., the creditor held a warrant of attorney from the principal to confess judgment, of

which the surety did not know, and the creditor entered up judgment thereon, levied on chattels of the principal sufficient to pay the debt, afterwards withdrew the execution, and the property was lost as security. Held, the surety was thereby discharged. The Lord Chancellor said: 'The mere circumstance that the * * * (surety) did not know that * * * (creditor) held a warrant of attorney would be of no consequence, because sureties are entitled to the benefit of every security which the creditor had against the principal debtor, and whether the surety knew of the existence of those securities is immaterial, and I think it clear that though the creditor might have remained passive, if he chose, yet if he takes the goods of the debtor in execution, and afterwards withdraws the execution, he discharges the surety, both at law and in equity. * * * *The principle is that he is the trustee for all parties interested.*' If the creditor releases the lien of the judgment or execution on the property of the principal that the surety will be released, EVEN THOUGH THE CREDITOR DID NOT AT THE TIME KNOW THE FACT OF SURETYSHIP. With reference to this, it has been said that it is the fact of the relation of principal and surety with or without the creditor's knowledge of it that gives the right of substitution. The right is inherent in the transaction if the relation exists. * * * While the law enforces the payment of * * * (creditor's) claim, it does not make his will the law of the contract and allow him to shift the burden from the property of one defendant to that of the other at his pleasure; nor may he blindly act so as to affect the rights of others, and then excuse himself by saying *he did not know*. He should not in any way discharge one of his joint debtors (*or one piece of property jointly liable*) without the assent of the other, for that other has an interest in that act the knowledge of the * * * (creditor) of the fact of suretyship was therefore immaterial. It has been held that if the creditor releases from the lien of a judgment sufficient real estate of the principal to pay the debt he thereby discharges the surety, even though there remains enough real estate of the principal subject to the lien of the judgment to pay it. To hold the surety liable in such case would be throwing the risk entirely upon him. He is discharged to the extent of the property released." Citing Holt *vs.* Bodey, 18 Pa. St., 207.

"It has been held that if the sheriff, without direction

from the creditor, release personal property of the principal which he has levied on, the surety is discharged *pro tanto*, and that the act of the sheriff in this respect is the act of the creditor." Citing Lunsden *vs.* Leonard, 55 Ga., 374.

In the case of Martin *vs.* Taylor, 8 Bush. (Ky.), 384, we find the following facts: One Sundersfun owed Taylor a debt on which Martin, Cooper, and Haynes were sureties. Sundersfun, without the knowledge of Taylor, made an arrangement with Cooper and Haynes to pay the debt. Suit was brought, judgment obtained against all, and a levy made on some of the property of Cooper. Taylor released the levy. The court in deciding the case and discharging Martin said:

"As the mill of Cooper levied on by the sheriff was amply sufficient to pay the debt, and as Cooper was in fact the principal, * * * Taylor could not intervene and prevent the sheriff from going on to make the money, * * * and by ordering the execution to be returned * * * he thereby discharged the appellant (Martin) from liability as surety, *and that would be the consequence even if he did not know of the obligation Cooper was under to pay the debt.* Appellant's (Martin) rights were the same, whether appellee (Taylor) was apprised of the condition the parties occupied or not, and any act by which his legal rights were interfered with on the part of Taylor * * * would operate as a release to him."

If we should call Gardner, Blish & Co. Sundersfun, the lots 116 and 117 Cooper, as by the levy on them they became principals and primarily liable, and Milmine's property Martin, the case would fit in names as it now does in principle.

As has been heretofore stated, the Stearns judgment was obtained May 12, 1873. The interest was paid in advance from time to time at 10 per cent.—the last payment from July, 1876, to January 1, 1877. Our mortgage was executed and recorded in 1875.

We think that Messrs. Stearns *et al.* by voluntarily sus-

pending the power of executing their judgment from time to time after our lien attached lost their priority by so doing.

In the case of Brown *vs.* Clark, 4 Howard, 13, which is copied by Freeman on Judgments, sec. 389, the facts were that on the 18th of May, 1840, Brown obtained a judgment against one Haywood, issued execution, and levied on certain slaves, a forthcoming bond was given, approved by Brown, and the slaves released. In June, 1840, Clark also obtained a judgment against Haywood; he issued execution and bought in some of the slaves levied on by Brown. Brown's bond turned out to be worthless; he had it set aside, and as judgments in Mississippi are a lien from date of their rendition on both real and personal property, levied on the slaves bought by Clark, claiming his lien first. The court held that the quashing of the bond might, as between the parties themselves, continue the lien while it was suspended or discharged in contemplation of law, "but that it would be against principle and work manifest injustice to give to it this retrospective operation, so as to extinguish the intermediately acquired rights of third persons."

There are a number of cases that to us seem in point as to this position, and as to the effects of the seizure of the lots 116 and 117 upon the execution of Stearns in extinguishing the judgment for the time being, and thus giving priority to other liens that but for this satisfaction would have been junior.

In Rankin *vs.* Schatzell, 12 Wheat., 177, C. J. Marshall said:

"The principle seems to be universal that the prior lien gives the prior claim to satisfaction. The mere inaction of the judgment plaintiff will not change it. It is not lost unless it is intrinsically defective or be displaced by some act of the party holding it that shall postpone him, in a court of equity to a subsequent claimant. * * * The implied lien of the first judgment retains the preference over a second judgment so long as an *elegit* can issue on the first."

Are we not to gather from these rules that the first judgment retains priority only during the time it may be enforced, and if a party surrenders that right as to junior incumbrances his property is gone?

Again, in the case of Rockhill *vs.* Hanna, 15 Howard, 189, a case from our own circuit:

On the same day, November 19, 1838, Rockhill, Stier, and Price each obtained judgments against one Allen. Rockhill caused a *ca. sa.* to issue and arrested Allen. The others caused *fi. fa's* to issue and levied on certain of Allen's property. Allen was discharged as an insolvent and Rockhill got nothing on his *ca. sa.* On the question as to the priorities of the parties the court held that Rockhill by issuing his *ca. sa.* and taking Allen into custody suspended his judgment for the time being, and as Stier and Price had acquired rights in that time they had gained priority. In making the decision the court cited many authorities. We can see no distinction, and none are pointed out in any of these cases, that would change the effect of a suspension of the judgment by the issuance of a *ca. sa.* and a valid agreement giving up the right to issue a *fi. fa.* on account of the payment of interest. If that be so, Stearns *et al.* lost their priority by taking their interest in advance and binding themselves not to enforce their judgment for certain time.

We also think there is no difference whether the judgment and the right to execute it becomes dormant or suspended by the act of the judgment plaintiff acting affirmatively, or from neglecting to issue till it becomes dormant or is suspended by operation of law. If that be so, there can be no doubt but that Stearns *et al.* lost their priority as to our mortgage lien.

In the case of Beaver *vs.* Curtis, 5 Ohio, 178, one Beaver obtained judgment against one Smith; levied execution on three hundred and twenty acres of land. This execution

was returned not sold for want of bidders. Several writs of *vendi.* were afterwards issued and returned in the same way. No further execution was levied for five years. It was then revived on a *sci. fa.* and levied on a lot bought while the first execution was out. Norton brought suit to enjoin the sale of the lot. The court said:

"When the judgment becomes dormant the means of enforcing the lien are suspended, because they necessarily slumber with the judgment. * * * So far as the debtor is concerned, the lien of the revived judgment exists in all its original force; but it does not follow that the rights of others acquired or subsisting under the dormancy of the judgment are subordinate to the revived lien. In a country where land is one of the most familiar and ordinary subjects of trade the policy of the law does not favor liens which embarrass their transfer. The purchaser who acquires title to land at a time when no lien exists, or at a time when by the creditor's delay a once existing lien becomes dormant, appears to us to have an equity preferable to him who has indulged in delay."

In the case of Miner *vs.* Wallace, 10 Ohio, 404, it is held that where real estate is subject to two liens, the elder a judgment, the junior a mortgage, if the judgment lies dormant five years its priority is lost and the mortgage takes the estate.

And again, in the case of Tracy *vs.* Tracy, 5 McLean, 456, the same point is decided in the same manner.

The master and the court below both conceded the correctness of the theories involved in the foregoing argument on this question of extension of time, but refused to give it effect in this case, because for the reason, as they state, that if Prentiss & Falls did not agree to and were not bound by the written consent given by Bowser in the firm name, then Stearns would not have been bound and could have issued their execution at any time. But I suggest, as to this point, that as to these sureties their partnership relation gave no authority to either to bind the others as to their continuing

liability on the extended judgment. The use of the firm name by Bowser was a valid consent by him to such extension and bound him, and the Stearns were bound to know that he had no right to use the firm name and did not thereby bind his partners. Hence the extension was valid and bound Bowser, but discharged Prentiss & Falls, and, as a consequence, the Milmine land.

If the decree below is affirmed the appellee asks it to be affirmed as conditioned, and that the appellee's title be quieted, and that he have possession of the premises in controversy.

L. M. NINDE,
THOS. E. ELLISON,
For Appellee.

Supreme Court of the United States.

OCTOBER TERM, 1889.

JOHN H. BASS

vs.

GEORGE MILMINE.

ADDITIONAL BRIEF FOR APPELLEE.

L. M. NINDE,
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For Appellee.

GAZETTE PRINT: FORT WAYNE, IND.

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JOHN H. BASS *vs.* GEORGE MILMINE.

ADDITIONAL BRIEF FOR APPELLEE.

By leave of Court given at the argument we will answer the brief of Appellant filed under said leave.

When a sale is made upon an *alias* writ the purchaser at such sale is charged with notice of all previous writs issued, levied and returned upon the same judgment. They all become matters of record and parts of the record upon which his title rests.

By Sec. 677, Rev. Stat., 1881, the clerk is required to keep an execution docket in which is to be entered the amount of the judgment, the interest due at the issuing of the execution and the sheriff's return. This record is notice of the facts it contains. By Sec. 584 the judgment docket is also made a record. This judgment docket is the one on which replevin bail is entered and is notice to every one. By these records Bass was fixed with notice of the issuing of these writs and the sheriff's return thereon. By Sec. 682 of said Revised Statutes it was made the duty of the clerk to state in or on the execution the "amount of the judgment and the amount actually due thereon." This the clerk did.

See *fi. fa.* No. 9,160 and endorsement thereon, Rec. p. 76 and 77. Also *fi. fa.* No. 9,351, p. 79, of Rec.

The clerk, by authority of these statutes, entered upon these two writs the fact that $500 had been paid and also the interest till January 1, 1877. It became the official duty of the clerk to enter such payments on the writs, and when entered the presumption is that the entries were true. These proceedings and the payments stated in them were records and constructive notice to Bass.

Neal *vs.* Pressell 4 Ind. 594.

By said Sec. 682 it became the clerk's duty to ascertain the amount due on the judgment when he issued execution. He is not bound to record the information he gets, but to state the fact in or on the writ. These endorsements on the writs of said payments were official acts.

When the executions were returned to the clerk's office they became records and were as such records notice to Bass.

In 4, Bld. 489, the court said:

"Our statute requires the sheriff to make return of all executions that come to his hands with his doings thereon, and it is the duty of the clerk to file them amongst the papers of the court. When filed all the objections which apply to the removal of any other record will apply to their removal. If a writ be returned it is a record."

In Doe *vs.* May, 2 Ind., 167, Judge Blackford says:

"The execution when returned is a record."

The Appellant claims that Milmine should be charged with constructive notice of the writ issued and levied upon his land and of the sale under it. Why is not Bass chargeable with constructive notice of similar writs previously issued upon the same judgment? The constructive notice to each is identical. But, if Bass is chargeable with constructive notice of these previous writs and their contents, he was bound to know of the credits and his sale is void.

As to extension of time:

The liability of J. C. Bowser & Co. was that of sureties and none other.

The Stearns recognized them as sureties. Bass knew they were sureties.

The executions declare them sureties. The very execution levied upon the Milmine land declares Bowser, Prentis & Falls to be sureties.

Rec. p. 84.

There is nothing in the record to show that the acceptance related to the business of the firm. There was no consideration for it so far as it appears. If Bass desired to establish the fact that Bowser, Prentis & Falls endorsed this paper for a consideration, he ought to have shown it by competent evidence. The fact that they are sureties without more shows only a suretyship for accommodation or without consideration passing to them. If Bass claims more to sustain so unjust a purchase as his, he should be required to furnish the proof. But if it was an acceptance for accommodation, then Stearns knew that Bowser's signature only expressed his own consent, and they were bound to know that Prentis and Falls were released when the extension was given. But when this extension was made suspending the judgment for eighteen months after the date of Milmine's mortgage, the property in Milmine's hands became the surety as between him and Bowser and Bowser the principal. As to Bowser at least the extension was good and the collection was suspended as to him. If Milmine had paid the debt to protect his land his remedy against Bowser was gone for eighteen months and his release as surety must result.

But, suppose it was a partnership transaction and the acceptance in the course of partnership business, then surely the judgment was suspended till January 1, 1887. Milmine's mortgage deed was with full covenants of warranty of title and against incumbrances.

See Rec. p. 16.

By our statute the words "mortgage and warrant" are made equivalent to such full covenants of warranty.

As between Bowser and Milmine the former was by virtue of said covenants bound to pay the debt of Stearns and protect Milmine's land therefrom. If Milmine, to protect his lien or title, had paid Stearns he would have become subrogated to the Stearns judgment and as surety paying was entitled to all the remedies the Stearns had and when Stearns suspended the remedy of execution it discharged the Milmine land.

In any view that can be taken of this agreement to suspend execution, Milmine's land was released.

It is said by counsel that the values of the property can have no bearing upon the legality of Bass' purchase of the land in controversy, and he denies the values we assume.

As to the values we stand upon the record:

There were five witnesses as to the value of the land in controversy. Two never saw it and only testified in a general way and put the property at $75 to $80 per acre. They both manifestly value it as farming land, without knowledge as to its exact location. Abbott and the two Edsalls put it at $200 to $300 per acre, and one of them was offered, for similar land adjoining, $750 per acre.

Bass is committed to these values by his failure to controvert them by testimony.

See the testimony of Abbott and Edsalls on pp. 101, 102, 103 and 104 of Rec.

There is no conflict in the testimony as to the value of the 334 acres of land and some other pieces described on p. 8 of our former brief. This property was worth in cash over $20,000. It was all purchased by Bass on executions issued on judgments against Bowser dated in 1876. These lands were sold to Bass, subject to prior judgment liens of over $7,000. Among these liens was the lien of the Stearns judgment. The price bid by Bass for these lands was less than $4,000, or less than one-fifth of their cash value.

This purchase was made by him, subject to all said prior judgments. The lands in his hands were still liable to said prior liens. He got them for one-fifth of their value,

because he had to buy them subject to said prior judgments, including the Stearns judgment. His purchase therefore involved the obligation to pay prior judgments, which enabled him to buy at such nominal price. If A sell to B land for $1,000, which is worth $2,000, because there is a mortgage of $1,000 on the land; B must pay the mortgage to pay for the land. In such a transaction B's purchase would be an assumption of the prior lien. The fact that A sold for $1,000 because of the lien and, the fact that B purchased for that sum because of the lien would transfer the obligation to pay the lien to B, else he gets $1,000 worth of land for nothing. If B has to pay it he can have no personal claim on A unless he secures A's express covenants against such encumbrance. Neither would B, in such a case, have any equity to have the mortgage debt made out of A, or out of other property of A the mortgage might include: such a claim would be unconscionable and no court of equity would sustain it.

Bass bought this $20,000 worth of property subject to said prior liens for their amount at least less than he would have been compelled to pay. And as between him and Bouser and him and Milmine he was equitably bound to pay said prior lien. He had received in the purchase of these lands a full consideration for the payment of the Stearns judgment and the other prior judgments, Milmine bore no such burden. His mortgage was made and recorded before the date of the judgments on which Bass purchased said $20,000 worth of land. When Milmine's mortgage was made and recorded, Bowser owned said lands and Bowser was legally, by virtue of his covenants in Milmine's mortgage and equitably without said covenants, bound to turn out said lands to pay said prior judgments.

Bass by his purchase stepped into Bowser's shoes and got no better title than Bowser had. He took the titles burdened with the same burdens under which Bowser held them. He could get no better or higher title. Bass claims he was under no obligation to Milmine. But he was under obliga-

tion to be honest and pay the debts out of the property that was liable to pay them in Bowser's hands and in his hands. He relieved himself and his property from this obligation to pay by the purchase of the Milmine land, which was not subject to any legal or equitable obligation to pay the debt. This brings the case at bar precisely within the cases we have relied on.

The cases establish the distinction between a purchase by one at execution sale, who is under no obligation to pay the judgment upon which the sale is made, and the purchase by one who is under obligation to pay the judgment.

All the cases cited by the Appellant are cases in which the purchaser at the sheriff's sale was under no legal or equitable obligation to pay the judgment on which the sale was made.

The case of Sansberry *vs.* Lord, 82 Ind., 521, cited by Appellant, is one where the sale was made to a stranger who was under no obligation personally or by virtue of property held by him to pay the judgment.

In that case Sansberry was the judgment plaintiff. He was entitled to collect the judgment instead of being under obligation to pay it. And the party attacking this sale had no standing in court because his deed was fraudulent and void and Sansberry had no notice of the equity of the Plaintiff.

The case is in no sense an authority for Bass.

The Appellant cites Richey *vs.* Merritt, 108 Ind., 347.

The judgment was a lien on the land of Richey and Merritt and on lands owned by other parties.

Richey purchased the judgment and Merritt's land without any objection from him was levied on and sold when other lands in equity ought to have been first sold. Merritt not only stood by and suffered his land sold without objection, but purchased part of the lands levied on at the same sale. He was estopped by the most common principle of the

law of estoppel to attack the sale of his land. He stood by and gave no notice of his title, but acquiesced in the sale by joining in the purchases made under the writ.

But when this Merritt case was before the court on a former appeal the principle we contend for was clearly recognized and established as the rule in that court.

The complaint was demurred to and the demurrer sustained. It averred the first sale to Merritt, the subsequent sale to Richey, the levy on Richey's property, the abandonment of the levy and the levy upon Merritt's property. The court held that, as between Merritt and Richey, Richey owed the duty to Merritt to pay the judgment and protect Merritt's property and that a purchase by Richey of Merritt's property where such obligation existed was void and that Merritt had the right to file his bill to have such purchase by Richey declared void.

The court says:

"This being the rule in equity it follows as a sequence that, as between the first and subsequent purchaser, it becomes the duty of the latter to pay the judgment by allowing the land purchased by him to be first applied to the payment of the judgment."

This is the only case in Indiana that decides the precise point in issue in the case at bar, and the ruling is with the Appellee.

Notwithstanding the counsel's criticism of James *vs.* Hubbard 1, Palge 228, it stands as a decision directly in line with the case of Merritt *vs.* Richey, *Supra.* Hubbard recovered judgment against Tuckerman and Tuckerman, then sold part of his property to James, and afterwards other parts to Berry and after that other parts to others, execution issued and by the dirrection of Hubbard's agent all the lands were levied on.

James gave notice to Hubbard and to those attending the sale that he should require the lands sold after his purchase

to be first sold. Berry, who held the second lot sold, interfered and procured the sheriff to sell the James land.

James brought his bill to compel Berry to pay the judgment and redeem his land.

Regarding the fact that Stearns and Bass well knew all the facts that the notices served by James fixed upon Hubbard and Berry, the case is at "all fours" with the case at bar. The identical principle we contend for was sustained by the court. On page 232, the chancellor says: "The only question then in this case is, what was equitable between the parties in relation to the lands actually advertised by the sheriff of Madison. In Clower *vs.* Dickinson (5 John, Ch. 235) it was decided that a judgment creditor had no right to enforce his judgment against the land of a subsequent purchaser so long as there was other land remaining in the hands of the judgment debtor or his heir at law sufficient to satisfy the lien."

On page 234 the chancellor discusses the question as to mode of enforcing these equities and says: "If the agent of Hubbard had left the sheriff to exercise his own discretion in deciding upon the equitable claims of the different purchasers of the land, I should have no difficulty in this case in deciding that the purchase of the complainants' farm must stand, and that his remedy was against the other parties to compel them to refund the purchase money, so far as they were benefitted by such a sale in discharging their own lands from the lien of the judgment. On the other hand, if the complainant had made all the owners of the lands which he now insists should have been first sold parties to this suit, I should have no difficulty in doing justice between them." * * "And as the heirs of Berry are parties to this suit the complainants' equitable claim against that farm can still be enforced." And the court ordered the Berry farm to be sold and the proceeds applied to the relief of plaintiff's land. This case takes the same distinction that the cases above cited from Indiana take. If the sheriff is left without direction from any of the parties

the sale may be sustained, but if he is directed by the judgment plaintiff or any of the subsequent purchasers to make a levy against the equities, the sale will be set aside or the parties benefitted will be held to reimburse the first purchaser for the loss of his land.

Counsel seeks to escape from the authority of Clones *vs.* Dickinson, (5 John, 235) by the suggestion that the subsequent purchaser of the debtor's lands in that case, bought subject to the judgment lien. It was averred in the bill that the subsequent purchaser bought subject to the previous liens. This was denied by the answer. The witnesses testified that "the sheriff sold the property subject to all elder judgments and incumbrances, and that they believed these prior incumbrances entered into the calculation of the bidders." Such was the exact condition at the sales to Bass on the judgments subsequent to the date of Milmine's title.

There was no express assumption to pay the prior judgments by Dickinson any more than there was by Bass. Both took them into consideration in bidding. The court declared the rule to be as between the judgment debtor and his vendee with covenants of warranty, that the debtor was bound to pay the lien off and protect his vendee, and that the same rule operated as against the debtor's lien. And as to the first and subsequent purchasers the court said of the latter: "In this respect we may say of him as is said of the heirs, *he sits in the seat of his grantor* and must take the land with all its equitable burdens." This principle is but common honesty. But Bass claims that because he owed Milmine nothing, because they were both creditors of the same debtor and stood at arm's lengths, he could disregard Milmine's equities with impunity. Suppose Milmine was entitled to no favors from Bass, yet Bass cannot honestly hold Milmine's property, obtained by management, little short of trickery.

The master has well said, p. 167, but to allow him (Bass) to succeed in his efforts to cut out the Milmine mortgage would be in the master's opinion grossly inequitable. The

master is inclined to the opinion that the testimony of Mr. Stratton as to Bass' agency in procuring the release of the levy on lots 116 and 117 and the levy of the *alias* execution upon the land covered by the Milmine decree is substantially correct, and that though Mr. Bass' conduct, may seem perfectly fair to him as a business matter, it was not such as should meet the approval of a court of equity.

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